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*Commissioner Rivera resigned September 13, 1985

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INDEX

Page

Access/Divestiture Tariffs; re Commission adopted Order finding certain rates unlawful, CC Docket 83-1145, (FCC 85-100) 1007

Access/Divestiture Tariffs; re Commission denied petitions for reconsideration of *Allocation Order*. FCC 85-293, CC Docket No. 83-1145, (FCC 85-598) 503

Aeronautical Radio, Inc.; re Petition for declaratory ruling and expedited relief, (FCC 85-494) 1

Alascom; re Application for review denied, (FCC 85-346) 8

Alaska Public Utilities; re Request for recommendations governing allocation of toll interconnect facilities, (FCC 85-300) 14

Alden Communications Corp.; re Review Board remands comparative TV proceeding to ALJ, MM Docket No. 83-720, (FCC 85R-90) 518

Alden Communications Corp.; re Applications for construction permit, MM Docket No. 83-720, (FCC 85D-26) 523

Alpha B/cing Corp.; re Violation of lowest unit charge and nondiscrimination provisions of Communications Act and Commission's rules, (FCC 85-526) 18

Amendment of Part 15; re Operation of low power communication devices in 1.6 to 10 MHz band, Gen Docket 85-129, (FCC 86-33) 1042

Amendment of Part 43; re Rulemaking proposes to streamline FCC rules pertaining to filing of contracts, CC Docket No. 85-346, (FCC 85-601) ... 531

Amendment of Part 73; re Operation of international b/c stations in Region 3 in 7100-7300 kHz band, MM Docket No. 84-706, (FCC 85-545) 544

Amendment of Part 73; re Deletion of AM application acceptance criteria; AM assignment standards and relationship between AM/FM b/c services, MM Docket No. 85-39, (FCC 85-586) 548

Amendment of Sec. 73.202(b); re FM Channel 261A alloted to Julian, Ca., MM Docket No. 83-1323, (FCC 85-115) 27

Amendment of Sec. 73.3598; re Commission extended time period for construction of b/c stations, (FCC 85-647) 1054

Amendment of Part 76; re Commission instituted new rules & requirements for cable entities regarding EEO, MM Docket No. 85-61, (FCC 85-511) .. 562

Amendment of Section 76.51; re Report and Order amends list of Major TV Markets, MM Docket 84-111, (FCC 84-573) 1062

American Christian TV System, Inc.; re Application amendments dismissed, (FCC 84-365) 31

Amer. Info. Technologies, Inc.; re *Memorandum Opinion and Order* adopted approving permanent capitalization plans, (FCC 85-28) 1089

AT&T Co., re Commission adopted Order that removes structural separation requirements for AT&T's provision of CPE, CC Docket No. 85-26, (FCC 85-509) 655

AT&T Co.; re Commission denied several applications for review of its Block of Time Order, (FCC 84-562) 701

AT&T Co.; re *MO&O and NPRM* adopted concerning provision of customer premises equipment, CC Docket No. 85-26, (FCC 85-56) 627

AT&T Co.; re Regulatory treatment of expenses incurred by Western Electric Co. (FCC 85-331) 35

AT&T Communications; re Commission granted MCI's petition and rejected AT&T's tariff revisions under Transmittal No. 173, (FCC 84-563) 706

AT&T Earnings; re Revenues received during 1978 violated rate of return prescription order, CC Docket No. 79-187, (FCC 84-567) 52

Bill R. Wright; re Application for review denied, (FCC 85-610) 1142

Billing/Collection Services; re *Report and Order* adopted detariffing interstate billing & collection services, CC Docket 85-88, (FCC 86-31) 1150

Business Radio Communications, Inc.; re *Memorandum Opinion and Order* adopted affirming cancellation of 800 MHz trunked channels, (FCC 85-596) 714

CATV Cross Ownership; re Petition for rulemaking denied, Sec. 76.501 amended, Docket No. 20423, (FCC 84-527) 81

Cellular System One of Tulsa; re Application for transfer of control granted, (FCC 85-322) 86

Character Qualifications; re Guideline principles established relating to Commission's evaluation of applicant's character qualifications, Gen Docket 81-500, (FCC 85-648) 1179

Chester Associates; re Review Board holds in abeyance comparative FM case before it on exceptions, MM Docket No. 84-525 (FCC 85R-71) 93

Chester Associates; re Applications for CP for FM station, MM Docket No. 84-525 (FCC 85D-9) 100

Coast TV; re Review Board reinstated application that was dismissed by ALJ, MM Docket No. 84-934, (FCC 85R-89) 718

County of Los Angeles; re Petition for Special Relief granted to an extent and Commission's Rules waived to and extent, (FCC 85-621) 724

Cox Cable Communications, Inc.; re Common carriage, (FCC 85-455) 110

Cuban-American Limited; re Review Board affirmed ALJ's interlocutory ruling which dismissed an application with prejudice, MM Docket 85-27, (FCC 85R-99) 1238

Daniel Meister; re Review Board affirms ALJ ruling denying petition to intervene, MM Docket No. 83-955, (FCC 85R-46) 744

Delaware B/cing Co.; re License renewal applications for WILM and WAMS, Wilmington, Del. and for WBUX, Doylestown, and WNPV, Lansdale, Pa. (FCC 85-486) 133

EBS Weekly Test Script Waiver; re Commission granted waiver of Section 73.961(d) of rules, (FCC 85-528).......... 750

Extended Area Service; re Petition for declaratory ruling granted in part, (FCC 85-644).......... 1243

Fairness Doctrine; re Report resulting from reexamination of statutory, constitutional and policy considerations, MM Docket 84-282, (FCC 85-459) 143

Family Media, Inc.; re Applications for construction permit for new TV Station, MM Docket No. 83-727, (FCC 85D-13) 759

Family Media, Inc.; re Review Board remands comparative TV b/c proceeding, MM Docket No. 83-727, (FCC 85R-85) 752

Gannett Co., Inc.; re Applications seeking consent to transfer of control of Evening News Assn. granted subject to conditions, (FCC 86-21).......... 1263

Gary D. Terrell; re Applications for construction permit, MM Docket No. 84-961, (FCC 85D-33) 792

Gary D. Terrell; re Showing that applicant's antenna site proposal is infeasible does not itself constitute a *prima facie* showing, MM Docket No. 84-961, (FCC 85R-82).......... 787

Golden State Broadcasting Corp.; re Proceeding remanded to assess impact of relocation of operating towers on proposals, BC Docket No. 79-56, (FCC 85-622).......... 797

Hillebrand B/cing, Inc.; re Review Board affirmed ALJ's dismissal of application, MM Docket No. 85-13, (FCC 85R-69) 804

Hillebrand B/cing, Inc.; re Review Board denied petition for reconsideration of *MO&O*, MM Docket No. 85-13, (FCC 85R-94) 809

Horizon Community B/cers, Ltd.; re Review Board affirmed ALJ's interlocutory ruling which dismissed application with prejudice, MM Docket 84-1031, (FCC 85R-100).......... 1267

International B/c Consultants, Inc.; Review Board reversed ALJ's return of application to processing line, MM Docket 84-157 (FCC 85R-73) 254

International Carrier Policies; re Development of competitive carrier policies for international telecommunications common carriers to streamline Title II tariff and facility regulations of non-dominant firms, CC Docket No. 85-107, (FCC 85-585).......... 812

Ithaca TV Associates; re Second Petition to Enlarge Issues and for Reconsideration denied, MM Docket 83-475, (FCC 85R-102) 1272

James W. Smith; re Amateur station license revoked and operator license suspended, PR Docket No. 84-774 (FCC 85R-77) 258

James W. Smith; re Revocation/suspension of licenses, PR Docket No. 84-774, (FCC 85D-21) 262

KIST Corp.; re Review Board Decision, FCC 84R-74, 55 RR 2d 49, modified and affirmed, BC Docket Nos. 81-863, 867, 868, 870, 871 (FCC 85-512).. 288

Low Power TV; re Application requirements and revised rules, MM Docket No. 83-1350, (FCC 84-492) 295

L. P. Media, Inc.; re Special Temporary Authorization granted to independent trustee to solicit, acquire and purchase shares subject to conditions, (FCC 85-477) 1276

Louisiana Super Comm. Ltd. Partnership; re Review Board affirmed TV grant, MM Docket 84-43, (FCC 85R-101) 1293

Louisiana Super Comm. Ltd. Partnership; re Applications for CP for TV station in Baton Rouge, La., MM Docket 84-43, (FCC 85D-39) 1312

Makai B/cing, Inc.; re Review Board affirmed ALJ's I.D., MM Docket 83-1113, (FCC 85R-78) 322

Makai B/cing, Inc.; re Applications for CP for FM station, MM Docket 83-1113, (FCC 85D-18) 327

Marrow Enterprises, Inc.; Review Board affirmed I. D., MM Docket 83-941, (FCC 85R-70) 334

Marrow Enterprises, Inc.; re Applications for CP for FM station, MM Docket 83-941, (FCC 85D-5) 342

Metromedia Radio & TV; re Applications for assignment of licenses, (FCC 85-606) 1334

Music Sound Radio, Inc.; re Applications for construction permit for new FM b/c station, MM Docket 83-1068, (FCC 85D-47) 1364

Music Sound Radio, Inc.; re Review Board granted summary affirmance of *I. D.* in comparative FM b/c case, MM Docket 83-1068, (FCC 85R-104) .. 1356

MTS/WATS Market Structure; Petitions for further reconsideration denied, CC Docket No. 78-72, Phase I, (FCC 85-551) 849

Neil I. Sanders; re Applications for construction permit, MM Docket No. 84-1004, (FCC 85D-32) 870

Neil I. Sanders; re Review Board affirms ALJ's Summary Decision, MM Docket No. 84-1004, (FCC 85R-87) 865

Omaha TV, Inc.; re Applications for construction permit for new TV station, BC Docket No. 80-691, (FCC 83D-52) 892

Omaha TV, Inc.; re Review Board affirms ALJ's grant of TV construction permit, BC Docket No. 80-691, (FCC 85R-91) 875

Pacific Telecommunications; re Long term facilities plans, CC Docket No. 81-343, (FCC 85-457) 353

Part 76, Cable TV; re Rules amended concerning technical & operating requirements for cable TV systems, MM Docket 85-38, (FCC 85-587) 1372

Provision for 800 Service; re *Notice of Proposed Rulemaking* adopted to consider long-term obligations of exchange carriers, CC Docket 86-10, (FCC 86-27) 1387

Random Selection/Lottery Systems; re Special lottery preference for women denied, Gen Docket 81-768, (FCC 85-453) 1401

Reduced Orbital Spacing; re Order adopted establishing Advisory Committee, (FCC 84-488) 390

RKO General, Inc.; re Review Board denied appeal from ALJ's ruling dismissing appellant's application, MM Docket 84-1098, (FCC 85R-103) . 1417

Satellite Business Systems; re Changes in ownership structure approved, (FCC 84-589) 399

Satellite Relay, Inc.; re Review Board affirms ALJ's ruling denying petition for intervention, CC Docket No. 85-35, (FCC 85R-86) 938

Service Electric Cable TV; re Application for review denied, (FCC 84-450) .. 404

Shared Telecommunications Services; re *Notice of Inquiry* adopted, CC Docket 86-9, (FCC 86-26) 1421

Simon Geller; re Commission renews FM license, denies mutually exclusive applicant for CP, reversing previous result, Docket 21104, (FCC 85-640) . 1443

Technical/Operational Requirements; re Frequency authorization procedures & emission standards revised, MM Docket No. 85-36, (FCC 85-588) 940

Thelma Dale III; re Commission denied request for reconsideration of its *Memorandum Opinion and Order*, (FCC 86-23) 1454

Ultrasonic Equipment; re *Notice of Proposed Rule Making* adopted, Gen Docket No. 85-303, (FCC 85-549) 954

Uniform System of Accounts; re *Report and Order* adopted, CC Docket No. 84-469, (FCC 85-581) 964

Universal B/cing of Indiana, Inc.; re Application for review of denial of waiver of Section 73.207 denied, (FCC 86-34) 1457

University Television, Inc.; re Petition for reconsideration denied, (FCC 85-165) 1462

Utah TV Assn. Ltd. Partnership; re Review Board affirmed *I.D.* television grant, MM Docket 84-101, (FCC 85R-98) 1470

Utah TV Assn. Ltd. Partnership; re Applications for television construction permit, MM Docket 84-101, (FCC 85D-34) 1486

Vela Broadcasting Co.; re Review Board denied appeal from ALJ's order dismissing application, MM Docket No. 85-132, (FCC 85R-93) 997

Video 44; re Review Board remanded comparative renewal proceeding, MM Docket No. 83-575, (FCC 85R-74) 408

Video 44; re Applications for renewal of license and CP, MM Docket No. 83-575, (FCC 85D-11) 419

Voce Intersectario Verdad America, Inc.; re Review Board denied reconsideration, MM Docket No. 83-765 (FCC 85R-72) 465

Wavy Television, Inc.; re Proposal to move main studio from city of license denied, (FCC 85-625) 1538

Westcom Products, Inc.; re Petition for Rulemaking denied, (FCC 85-291) .. 470

Western Union Telegraph Co.; re Depreciation rates and write-downs of net investment, (FCC 85-51) 482

Western Union Telegraph Co.; re Reimbursements from IRCs for unauthorized discounts for Telex and TWX service, CC Docket No. 78-97 (Phase 1), (FCC 85-463) 485

Wisconsin Television, Ltd.; re Application for modification of TV construction permit granted, (FCC 85-531) 1001

Subject Digest

Alien

Assignment applications filed by alien were properly accepted for filing, since patent defect was noted and subsequently corrected: assignment applications not subject to competitive applicants and cut-off dates.
—*Metromedia Radio & TV*

Alien, Control

(See: Alien-*Metromedia Radio & TV*)

Alien, Ownership

(See also: Alien-*Metromedia Radio & TV*)

Antenna, Farm

Denied request for short-spacing waiver under Section 73.209(c) "antenna farm" exception where no showing of unavailability of fully-spaced site.
—*Universal B/cing of Indiana, Inc.*

Application, Amendment of, Engineering Charge

Review Board affirmed TV grant, crediting the limited partnership arrangement of one applicant and awarding full integration credit based on the participation of the general partners, while discounting the integration proposal of a second limited partnership. The activities of all partners in the winning applicant were consistent with a valid limited partnership, while the purported limited partner of the loser was active in virtually all aspects of the partnership. ALJ's acceptance of engineering amendment to cure short-spacing problem first raised in designation order also affirmed.
—*Louisiana Super Comm. Ltd. Partnership*
MM Docket 84-43

Application, Dismissal of

Review Board affirmed ALJ's interlocutory ruling which dismissed an application with prejudice for failing to show good cause for filing proposed findings of fact and conclusions of law 12 days after the mandated deadline. Applicant's serious and prejudical filing dilatoriness was several months in the making and typical of a general intractability in a complex, multi-party proceeding
—*Cuban-American Limited*
MM Docket 85-27

Review Board affirmed ALJ's interlocutory ruling which dismissed an application with prejudice. ALJ should have awaited responsive pleadings and considered special circumstances.
—*Horizon Community B/cers, Ltd.*
MM Docket 84-1031

Review Board denied appeal from ALJ's ruling dismissing appellant's application. Appellant blamed counsel for its faults and argued that dismissal was contrary to Commission policies favoring

minorities. The Board held that applicant could not escape consequences by shifting responsibility to counsel and that its minority composition did not outweigh failure to prosecute.
—RKO General, Inc.
MM Docket 84-1098

Billing Practices

Report and Order adopted detariffing interstate billing and collection services and continuing the Commission's deferral to state regulatory authorities with respect to the practice of disconnecting a subscriber's local telephone service for nonpayment of interstate toll charges.
—Billing/Collection Services
CC Docket 85-88

Cable TV

Commission eliminated technical performance standards for the retransmission of Class I channels by cable television systems that are subject to effective competition.
—Part 76, Cable TV
MM Docket 85-38

Commission reaffirmed its present policy of preemption of State and local technical standards for cable television.
—Part 76, Cable TV
MM Docket 85-38

Carelessness

Review Board granted summary affirmance of Initial Decision in comparative FM broadcast case where winner had overwhelming media diversification preference and slight ownership integration preference but loser had no preferences. Board rejected issue enlargement petition urging exploration of Section 1.65 failure to disclosed and carelessness issues, because of absence of *prima facie* showings that deficiencies were decisionally significant or intentional.
—Music Sound Radio, Inc.
MM Docket 83-1068

CATV Designated Television Market

Action adding communities to major television market designations in Section 76.51 of the Rules where Grade B contours of stations licensed to communities to be added are embedded within Grade B contours of stations licensed to communities in existing market designation.
—Amendment of Section 76.51
MM Docket 84-111

CATV Jurisdiction Over, by FCC
(See: Cable TV-*Part 76, Cable TV*)

CATV Carriage, Mandatory Signal
Denied petition for reconsideration of the Commission's decision finding that UHF television stations with mandatory carriage rights have no right to demand continued carriage on a specific channel on a cable system under the Commission's on-channel carriage rule.
—*University Television, Inc.*

CATV Carriage, On-Channel
(See: CATV Carriage, Mandatory Signal-*University Television, Inc.*)

CATV Technical Standards
(See: Cable TV-*Part 76, Cable TV*)

Character Qualifications, Abuse of Process
Report and Order and Policy Statement adopted establishing general guideline principles to be used in evaluating the character qualifications of b/c applicants. This action establishes the range of relevant behavior, both FCC related and non-FCC related, which the Commission will consider in its licensing process. Policies pertaining to character implications in the corporate and multiple ownership context are clarified. This action eliminates character as an issue in comparative proceedings unless the character defect goes to the applicant's basic qualifications.
—*Character Qualifications*
Gen Docket 81-500

Character Qualifications, Concealment
(See: Character Qualifications, Abuse of Process-*Character Qualifications*)

Character Qualifications, Effect of Criminal Conviction
(See: Character Qualifications, Abuse of Process-*Character Qualifications*)

Character Qualifications, Effect of Misrepresentation
(See: Character Qualifications, Abuse of Process-*Character Qualifications*)

Character Qualifications, Lack of Candor
(See: Character Qualifications, Abuse of Process-*Character Qualifications*)

Character Qualification, Non-Applicant
(See: Character Qualifications, Abuse of Process-*Character Qualifications*)

Character Qualifications, Nondisclosure
(See: Carelessness-*Music Sound Radio, Inc.*)

Citizenship Requirements
(See: Alien-*Metromedia Radio & TV*)

Common Carrier, Computer II
Memorandum Opinion and Order adopted approving permanent capitalization plans filed by the Regional Bell Operating Companies (RBOCs) for operation of separate subsidiaries in provision of customer premises equipment (CPE) and enhanced services. Order directs regions to file reports in regard to operations of their Centralized Operations Groups (COGs) and modifications to regions' plans for providing administrative services to their CPE subsidiaries. In addition, the regions are directed to conduct semi-annual samples of time spent on dial tone referral and to evaluate whether all costs associated with the service are charged to subsidiary.
—Amer. Info. Technologies, Inc.

Common Carrier Costs, Allocation of
Notice of proposed rulemaking adopted to consider the long-term obligations of exchange carriers under the Communications Act to provide 800 service access to interexchange carriers.
—Provision for 800 Service
CC Docket 86-10

Common Carrier, Data Process Service
Notice of Inquiry adopted initiating an inquiry into policies governing the provision of shared telecommunications services (STS) including the impact of STS on local telephone companies, its effect on telephone subscribers, both directly and through its impact on local exchange rates, and the effects of state regulation on STS implementation.
—Shared Telecommunications Service
CC Docket 86-9

Common Carrier Interconnection, Carrier to Carrier
(See: Common Carrier Costs, Allocation of-*Provision for 800 Service*)

Common Carrier, Interconnection, Customer-Provided Equipment
(See: Common Carrier, Data Processing-*Shared Telecommunications Service*)

Common Carrier, Rate or Tariff, Unlawful
Commission adopted Order finding certain special access tariff provisions and rates unlawful. Local exchange carriers ordered to file revised tariff material in compliance with order.
—Access/Divestiture Tariffs
CC Docket 83-1145

Common Carrier Rate Structure, Inquiry
(See: Common Carrier Costs, Allocation of-*Provision for 800 Service*)

Common Carrier, Rates
Petition for declaratory ruling granted in part to clarify the tariff treatment of nonpremium access in multicarrier exchange areas. Secondary exchange carrier may bill OCC or reseller separately and may use surrogate tariffic data in costing and tariffing.
—Extended Area Service

Common Carrier, Resale
(See: Common Carrier, Rates-*Extended Area Service*)

Common Ownership
Newspaper/broadcast cross-ownership rules found not to apply to prevent common ownership of a broadcast station and a national newspaper.
—*Gannett Co., Inc.*

Comparative Hearing
Review Board affirmed *I. D.* television grant, after denying real party-in-interest exceptions and awarding slight to moderate integration preference (98% v, 75%) over closest competitor. Discredited integration proposals involving: failure to implement previous commitment; no "legitimate interest and influence"; variance; inconsistency with cellular radio commitment; vagueness; active "limited" partners.
—*Utah TV Assn. Ltd.*
MM Docket 84-101

Construction Additional Time
The Commission extended the time period for construction of b/c stations. However, stricter criteria for the granting of applications to extend the time to construct broadcast facilities and for granting modifications and assignment/transfers were adopted to avoid unwarranted delays and expedite service to the public. These criteria were not imposed on Instructional TV Fixed and International Broadcast stations.
—*Amendment of Sec. 73.3598*

Construction Period
(See: Construction Additional Time *Amendment of Sec. 73.3598*)

Construction Permit Expiration of
(See: Construction Additional Time-*Amendment of Sec. 73.3598*)

Construction Permit Extension of
(See: Construction Additional Time-*Amendment of Sec. 73.3598*)

Construction Permit Modification of
(See: Construction Additional Time-*Amendment of Sec. 73.3598*)

Control, Transfer of, Authorized
STA granted to independent trustee to solicit, acquire and purchase shares as the first step in a tender offer to acquire control of a licensee: Section 309(f) applicable as tender offers are extraordinary within the meaning of the statue: long-form review to be made if the tender offer is successful.
—*L. P. Media, Inc.*

Control, Transfer of, Procedures
(See: Control, Transfer of, Authorized-*L. P. Media, Inc.*)

Copyright

Changes in a television market designation do not subject cable television systems to additional copyright royalty fees for carriage of distant signals where station was not in operation of April 15, 1976.
—Amendment of Section 76.51
MM Docket 84-111

Customer Premises Equipment

(See: Common Carrier, Computer II-*Amer. Info. Technologies, Inc.*)

Cut-off Rules

The cut-off date of a low power television or television translator construction permit application is properly conferred on all directly or indirectly mutually exclusive low power television or television translator applications filed at any time before the cut-off date.
—Bill R. Wright

(See also: Alien-*Metromedia Radio & TV*)

Delay Improper

Review Board denied enlargement and reconsideration petition of party-intervenor objecting to television grant in *Decision*, 58 RR 1068. Petition was untimely and failed to show that park official-affiant *personally* told applicant - rather than site lessee/tower owner - that its proposed transmitter site was unavailable. Delay caused by petition was unjustified to point of egregiousness.
—Ithaca TV Associates
MM Docket 83-475

(See also: Application, Dismissal of–*Cuban-American Limited*)

Deregulation

(See: Billing Practices-*Billing/Collection Services*)

Diversification

Commission determines that it does not have authority under section 309(i) of the Act, 47 U.S.C. Sec.309(i), or residual discretion under Title III, to award preferences to female applicants when first-time licensees in mass media services are selected by lottery.
—Random Selection/Lottery Systems
Gen. Docket 81-768

Diversification of Control of Mass Media

Commission renews FM license, denies mutually exclusive applicant for construction permit, reversing previous result after remand from Court of Appeals. Incumbent receives no renewal expectancy for minimal past performance. Incumbent's integration and diversification advantages outweigh challenger's proposed programming and comparative coverage advantages.
—Simon Geller
Docket 21104

Divestiture
(See: Common Carrier, Rate or Tariff, Unlawful-Investigation of-*Access/Divestiture Tariffs*)

Equipment Authorization
Report and Order adopted amending Part 15 of the Rules to permit the operation of low power communication devices in the 1.6 to 10 MHz band, including wideband and/or swept frequency devices. The regulations specify which form of equipment authorization should be obtained and which technical standards should be met, prior to use or marketing. They also allow the operation of wideband and/or swept frequency systems.
—Amendment of Part 15
Gen Docket 85-129

Failure to Prosecute
(See: Application, Dismissal of-*RKO General, Inc.*)

Findings and Conclusions by Parties
(See: Application, Dismissal of-*Cuban-American Limited*)

Forfeiture
Commission denied request for reconsideration of its Memorandum Opinion and Order upholding monetary forfeitures against vessel's owner and master for violations of listening watch requirement of Section 83.202(c). Vessel subject to listening requirement since it was being navigated in Delaware Bay, a tidewater adjacent or contiguous to the open sea.
—Thelma Dale III

Interlocutory Ruling, Appeal From
(See: Application, Dismissal of-*RKO General, Inc.*)

Issue, Enlargement of, Denied
(See: Delay Improper-*Ithaca TV Associates*)

(See also: Carelessness-*Music Sound Radio, Inc.*)

Lottery, Licensing by
(See: Diversification-*Random Selection/Lottery Systems*)

Low Power Communications Devices
(See: Equipment Authorization-*Amendment of Part 15*)

Main Studio Location
Proposal to move main studio from city of license in Portsmouth, VA., to Virginia Beach, Va, which is 2½ times as populous, is denied, because station would leave no permanent physical presence in Portsmouth and residents would be inconvenienced by 20-35 minute trip each way to the studio.
—Wavy Television, Inc.

Maritime Service, Shipboard Violations
(See: Forfeiture-*Thelma Dale III*)

Multiple Ownership
Daily newspaper owner permitted to acquire television station located in same market as newspaper on condition that newspaper interest be divested within 24 months of consummation of television acquisition.
—*Metromedia Radio & TV*

Newspaper Ownership
(See: Multiple Ownership-*Metromedia Radio & TV*)

Ownership
(See: Multiple Ownership-*Metromedia Radio & TV*)

Ownership, Diversification of
(See: Diversification-*Random Selection/Lottery Systems*)

Ownership and Management, Integration of
(See: Application, Amendment of, Engineering Charge-*Louisiana Super Comms. Ltd. Partnership*)

(See also: Diversification of Control of Mass Media *Simon Geller*)

(See also: Comparative Hearing-*Utah TV Assn. Ltd.*)

Partnerships
(See: Application, Amendment of, Engineering Charge-*Louisiana Super Comms. Ltd. Partnership*)

Past Performance
(See: Diversification of Control of Mass Media *Simon Geller*)

Preference
(See: Diversification-*Random Selection/Lottery Systems*)

Private Line Service
(See: Common Carrier, Rate or Tariff, Unlawful-*Access/Divestiture Tariffs*)

Programming, Minority Oriented
Public interest benefits of minority programming do not outweigh the strong public interest benefit in maintaining the integrity of the FM allocation scheme.
—*Universal B/cing of Indiana, Inc.*

Programming Proposal
(See: Diversification of Control of Mass Media *Simon Geller*)

Radio Frequency Device, Authorization
(See: Equipment Authorization-*Amendment of Part 15*)

Real Party in Interest
(See: Comparative Hearing-*Utah TV Assn. Ltd.*)

Reconsideration, Petition for, Denial of
(See: Delay Improper-*Ithaca TV Associates*)

Renewal, Applicant v. New Applicant
(See: Diversification of Control of Mass Media *Simon Geller*)

Rule Making, Notice of Proposed
(See: Common Carrier Costs, Allocation of-*Provision for 800 Service*)

Shortspacing
To meet threshold test for waiver of minimum spacing requirements, applicant must show existing site unsuitable and that non-short-spaced sites are not available.
—*Universal B/cing of Indiana, Inc.*

Special Temporary Authorization
(See: Control, Transfer of, Authorized-*L. P. Media, Inc.*)

State and Local Control
(See: Common Carrier, Interconnection, Customer-Provided Equipment-*Shared Telecommunications Services*)

Subsidiary Separate
(See: Common Carrier, Computer II-*Amer. Info. Technologies, Inc.*)

Tariff
(See: Billing Practices-*Billing/Collection Services*)

Tariff, Investigation
(See: Common Carrier, Rate or Tariff, Unlawful—*Access/Divestiture Tariffs*)

Tariff, Revision of
(See: Common Carrier, Rate or Tariff, Unlawful-*Access/Divestiture Tariffs*)

Telephone Disconnection
(See: Billing Practices-*Billing/Collection Services*)

Television Station, Authorization
(See: Comparative Hearing-*Utah TV Assn. Ltd. Partnership*)

Wide Area Telephone Service (WATS)
(See: Common Carrier Costs, Allocation of-*Provision for 800 Service*)

Common Carrier, Rate or Tariff, Unlawful
Divestiture
Private Line Service
Tariff, Investigation
Tariff, Revision of
Commission adopted Order finding certain special access tariff provisions and rates unlawful. Local exchange carriers ordered to file revised tariff material in compliance with Order.
— *Access/Divestiture Tariffs*
CC Docket No. 83-1145

FCC 85-100

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Investigation of Access and Divestiture Related Tariffs	CC Docket No. 83-1145 Phase I and Phase II, Part 1

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1985; Release: March 8, 1985

BY THE COMMISSION: COMMISSIONERS DAWSON AND RIVERA DISSENTING IN PART AND ISSUING A JOINT STATEMENT.

I. INTRODUCTION

1. In the February 19, 1985 Special Access Order in this proceeding,[1] the Commission addressed the non-cost issues presented by the special access tariffs filed on December 3, 1984. The Commission concluded in that order that the rate structures proposed by the local exchange carriers in their special access filings were generally acceptable but that certain modifications to

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[1] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-70, released Feb. 19, 1985 (*February 19 Order*).

the tariffs were necessary. In this order, we address the cost-related issues raised by the pending special access tariffs. Specifically, we discuss the rate levels proposed, the allocations between rate elements, and demand projections. Also addressed in this order are the transition proposed in the *November 9 Order* for special access rates,[2] the Docket No. 20099 Settlement Agreement[3] and the petition for stay of our *November 9 Order* filed by the Western Union Telegraph Company (Western Union or WU).

2. In this order, we find that certain adjustments are required to the rates proposed by the carriers if the rates are to be allowed to become effective without further investigation and suspension. These include rate reductions to correct overall problems with the carriers' projections of costs, corrections to the cost and demand methodologies of certain carriers, and the unbundling of certain rate elements to allocate costs more accurately.

3. Based on the record developed as a result of our request for comments in the *November 9 Order*, we also conclude that prescription of the proposed phase-in of the special access rates for other common carriers (OCCs) is warranted because of their unique circumstances and the need for further investigation of the proposed rates. There are still substantial issues as to the correct, ultimate rate levels for special access, despite the adjustments we have required here. Our allowance of the revised rates is accordingly conditioned on the requirement that those rates earn overall no more than the authorized rate of return. This approach should adequately protect most users. The American Telephone and Telegraph Company (AT&T) will not experience major overall rate changes, nor will most of its customers, who will generally benefit from offsetting reductions in long haul rates. Customers can also be protected by refunds if the rates do in fact earn more than the allowable return. Some customers requiring particular service configurations may confront significantly revised rates, but those revisions should reflect reasonable changes in the structure and the allocation of costs to rates. OCCs, on the other hand, will experience substantial increases which will not generally be offset by other rate adjustments, and refunds might well be too late to remedy the potential harm to competition. Those increases are also so abrupt because the Bell System did not

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[2] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 84-524, released Nov. 9, 1984 (*November 9 Order*).

[3] *See* American Telephone and Telegraph Company, 47 FCC 2d 660 (1974), 52 FCC 2d 727 (1975), *aff'd sub nom.* Carpenter v. FCC, 539 F.2d 242 (D.C.Cir. 1976) (20099 Agreement or Agreement).

revise the 20099 Agreement rates properly to reflect costs over the last 10 years. We thus conclude that a transition limited to the OCCs is reasonable, pending further investigation, and that the amount of any possible "shortfall" should not be recovered from other end users or carriers.

4. We conclude that this overall approach and result are reasonable and in the public interest. Clearly, none of the interested parties or groups will be wholly satisfied. Exchange carriers will be able to implement special access tariffs with rate increases, but, in some cases, at lower rates than requested. If the transitional OCC rates are in fact below cost, exchange carriers may earn less than the allowable maximum rate of return. The OCCs will benefit from the phase-in, but will nonetheless experience major rate increases. AT&T will continue to pay higher rates than the OCCs, but this will be brought to an end within a fixed period. Customers will experience rate adjustments and some increases, but these increases will be lower than proposed, will be partly offset by lower long haul rates, will be likely to better reflect cost, and will be subject to refunds if overstated.

5. We will investigate further the special access tariffs and rates. As was the case with the switched access tariffs which became effective in May 1984, we expect to monitor the results of these tariffs and, if necessary, will require appropriate adjustments based on information that will be acquired from actual experience. To protect customers further, we require that the carriers keep accounts of the special access charges to permit accurate refunds, if necessary.[4] Specific accounts of non-recurring charges are also required.

II. COST AND COST ALLOCATION ISSUES

A. Summary of Cost Issues

6. In the *November 9 Order*, we recommended that local carriers use the March 1984 cost support information as a basis for their December filings, with corrections and adjustments to reflect more accurate demand figures and various Commission

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[4] As discussed *infra*, because some aspects of the costs are still under investigation, we cannot be certain from the information presently before us that the authorized rate of return will not be exceeded by some carriers. If our monitoring of special access rates reveals that the authorized rate of return has been exceeded or that the rates or rate structures are otherwise unreasonable, or that the rates or rate structures are otherwise unreasonable, our accounting order gives us the ability to order adjustments as required so that no customer is paying more than reasonable rates.

requirements. Most of the filings adopted this suggestion, which was intended to narrow the remaining issues to achieve workable tariffs.

7. We have reviewed the revised tariffs, the support material, and the comments, and generally conclude that the revised tariffs form a reasonable basis for implementing special access, subject to rate reductons in the case of certain carriers. The reasons for these reductions, and the specific calculations of the level of these reductions, are fully explained in Appendix A. The following discussion summarizes the analysis and required reductions. These reductions are based on three factors.

1. *Adjustment for Overstatement of Budget View*

8. In our review of the switched access tariff costs and rates in May 1984, we concluded that the National Exchange Carrier Association (NECA) and Bell Operating Company (BOC) projections of growth in revenue requirement were overstated. We accordingly required a 1.7 percent reduction in the revenue requirement used to calculate switched access rates. In the *November 9 Order*, we declined to require a similar reduction for special access, because more recent actual operating information which was becoming available might indicate that the local exchange carrier access revenue requirements are higher than the estimates used by the carriers in the March filings. However, the Common Carrier Bureau recently reviewed actual operating results in connection with a proposal by NECA to increase switched access rates, which was allowed in part.[5] That analysis indicates that the special access revenue requirements of NECA and the BOCs were probably overstated by about 4 percent. We conclude that this more recent information indicates that the revenue requirements claimed by the BOCs in their March 1984 filings for special access are overstated.

2. *Allocation Adjustments To Reflect Revised Demand Figures*

9. In the *November 9 Order*, we directed carriers to examine and correct their estimates of special access demand, which contained serious errors. The carriers have done this, and the revised demand estimates are often both radically different from those used in the March filings and, we believe, significantly improved. Although some questions remain, the corrected demand

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[5] National Exchange Carrier Association, Mimeo No. 1990, released Jan. 17, 1985.

estimates appear to be acceptable pending further investigation and monitoring. However, some carriers have proposed to increase special access rates because they used both the old and the new demand figures at different stages of the rate calculation process. The result of this mismatch is to overstate rates in cases where the carrier used a relatively high demand figure to determine the costs that the special access rates should recover, and a lower demand figure to divide those costs in order to calculate a rate. We have examined the carriers' filings to calculate specific factors necessary to eliminate this disparity.

3. Demand Response

10. Some carriers propose to increase their rates by 1 to 6 percent because they project that the proposed rate increases will reduce private line demand. The propriety and accuracy of these adjustments are, however, unsupported and based on false or questionable assumptions. The carriers do not, for example, include the effects of the proposed transition plan for OCCs which we discuss more fully later in this order. The elasticity figures used by the carriers are not explained or supported, and are calculated for a one-year period although these rates are likely to be in effect for a much briefer period. In view of the volatility of private line demand, these proposed adjustments to expected demand are highly speculative. They also appear to be within the margin of error in the original estimates. For these reasons, we conclude that those carriers who proposed a demand response adjustment should remove it.

11. We have calculated rate adjustment factors for recurring and nonrecurring charges which should fairly implement these necessary adjustments for NECA and the various BOCs. As detaled in Appendix A, the overall result is to leave many of the carriers' rates unchanged, including those of NECA. Other carriers, we believe, should reduce their special access rates by amounts ranging from 1 to 29 percent. The mechanism for access rates by amounts ranging from 1 to 29 percent. The mechanism for implementing these reductions is set out in the conclusion of this order.

B. Cost Allocation Issues

12. In Appendix B, we discuss a number of issues raised in the comments relating to the allocation of costs to particular rate elements. These issues do not concern the level of the costs or the

right of the local carrier to recover the costs in its special access rates, but only whether the assignment of these costs to particular rate elements fairly recovers those costs from the customers on whose behalf they are incurred. In particular, commenters urge that the Channel Termination (CT) element, which reflects the cost of local loops from the customer to the local office, is improperly assigned costs for interexchange plant, and that the CT element thus spreads to all customers costs which apply only to certain customers. For example, Western Union argues that a large part of the CT rate recovers inside wiring costs, but that carriers generally provide their own inside wiring at their offices. Commenters also disagree on the allocation of costs between 2-and 4-wire circuits, which under NECA's filing results in 4-wire rates that are 23 to 29 percent higher than 2-wire. Some argue that 4-wire should be allocated twice the cost; others request that we prescribe no more than a 10 percent rate difference.

13. As we discuss more fully in Appendix B, we believe that some reallocations to assign costs more accurately are warranted. Interexchange carriers and end users who do not obtain inside wiring from the local carrier should not be required to pay the same rate as those who do. We believe that carriers should remove inside wiring costs from the CT element and recover it by a separate rate element. Certain adjustments to target rates more precisely also are indicated. With respect to other issues, further examination is necessary, but the proposed allocations do not, upon present information, appear unreasonable. The allocation of costs to 2– and 4–wire circuits is one example. It is not clear what the actual cost relationship is between these channels, or whether this differs from the proposed rate relationship. We have questions, but reach no present conclusions on other allocation issues, as discussed in Appendix B. We will examine them further in our continuing investigation.

C. Independent Telephone Companies

14. Our review of the costs and rates was directed, as a first priority, toward NECA and the BOCs, which provide the great majority of channels and present more difficult problems because of the Bell System divestiture. Although rate structure changes (similar to those made by the BOCs) prevent easy comparison of the December rates with the rates proposed in March, the proposed price of fully configured circuits of non-NECA major

independents (*i. e*, GTE, United, Centel) are generally at or below the prices proposed in March. Review of the carriers' cost support material reveals no substantial specific defects, with one possible exception discussed below. Further review and investigation of the underlying data, however, is necessary.[6] To the extent that further investigation reveals that rates are defective, the accounting order we are imposing herein should protect customers.

15. Review of the GTE and United cost support material reveals, however, that the March rate development process allocated all message station equipment costs to switched access, contrary to Section 69.303 of the Commission's Rules, 47 C.F.R. § 69.303. GTE and United claim that the rate development process used to determine proposed rates rectifies this error and correctly allocates message station equipment costs to the special access element in accordance with the *November 9 Order*, paras. 69–70. GTE and United do not indicate, however, whether the message station equipment costs previously misallocated to the common line element have been used in the computation of the common line net balances from NECA, in NECA's calculation of the common line rate of return, or in the actuals that NECA submitted in support of its switched access rate revision filing.[7] Although the misallocated message station equipment costs are small in comparision with the total common line revenue requirement,[8] it is possible that removal of misallocated costs from the computations underlying the Bureau's adoption of $.0543/MOU as the current carrier common line (CCL) rate might necessitate a slight reduction in the CCL rate. Therefore, we require NECA to determine the amount of message station equipment costs misallocated by the independent telephone companies.

III. NON-RECURRING CHARGES

16. The pending tariffs propose to assess the existing non-recurring charges (NRCs), but to apply them per termination

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[6] On January 25, 1985, the Bureau issued a Public Notice describing the prototype of a plan to monitor costs and usage of all exchange carriers that file access tariffs. Mimeo No. 2133. We intend to release this plan for comment. If adopted, the monitoring plan will provide a functional vehicle for the ongoing review of special access rates.

[7] National Exchange Carrier Association, Inc., Transmittal No. 23, FCC 1990, released January 17, 1985. The January 17 Order permitted NECA to increase the carrier common line rate from $.0524 per minute of use (MOU) to $.0543/MOU.

[8] We estimate that the misallocated costs are less than $10 million on an annual basis; the total revenue to be recovered by the carrier common line charge is approximately $9.2 billion.

rather than per circuit. The effect of this change is to double the current level of the NRC for a typical circuit with one termination at either end. The commenters argue that the local exchange carriers (LECs) have not justified this proposal. MCI comments at 31-32; WU comments at 67-68; TRT comments at 13.

17. In reply, the exchange carriers state that these parties overlook the fact that an exchange carrier must install a special access circuit at each customer premises. For each circuit, there are two customer premises and, accordingly, two installation charges would apply. NECA reply at 14; *see also* Pacific Bell reply at 2-7; Bell Atlantic reply at 15.

18. Although some rates in the special access tariffs are so questionable and apparently excessive that we would suspend them, if they are not revised, we conclude that this is not the case for the NRCs. Because of the lack of cost support for these proposed rate levels, we believe that an investigation is required, yet we are well aware that NRCs traditionally have not recovered the actual costs involved in processing customer orders, initiating service, and eventually terminating that service. The mismatch between these costs and NRCs is likely to be particularly large for the current NRCs, which are taken from OCC facility tariffs that implement the 20099 Agreement. Those rates have remained unchanged for over 10 years, despite the fact that these costs are likely to have increased substantially. Because the proposed NRCs are likely to recover more fairly costs which would otherwise be spread into monthly rates, we therefore are not inclined to suspend them and either require carriers to not recover these costs or require them to increase their recurring charges. Although we are troubled by the lack of specific support for those rates, we believe that further investigation and close scrutiny of the actual costs coupled with a separate accounting order expressly for NRCs should result in reasonable charges while protecting users in the event any of these charges do prove to be excessive.

IV. RATE VARIATIONS

19. In challenging the special access rates, the commenters point not only to rate increases, but also to variations in the proposed rates. The variations, they argue, draw into question the reasonableness of, and justification for, the rates. ARINC comments at 11-12, tables 1 and 2; Networks comments at 45-49; Joint Parties comments, Appendix 1 at 2-6; GTE Sprint com-

ments at 23-27, Table 3, Figure 1; IDCMA comments at 4-8; Lexitel comments at 5-10, Attachments 1 and 2; MCI comments at 4, 18-19, Tables 4 and 5; SATNET comments at 14-16, Tables 1 and 2; TBS comments at 13; Western Union comments at 20-23; Group W comments at 7. ARINC and SATNET, for example, contend that the BOC rates vary by more than 250 percent from NECA's rates and more than 700 percent from each other. Lexitel urges that Ohio Bell's proposed rates deserve "especially close scrutiny" because they are higher than the previously proposed rates and vary greatly from those of other Ameritech companies. Lexitel comments at 5. IDCMA focuses on the rates proposed by NECA and the BOCs for 1.544 Mbps services and argues that the wide variations strongly suggest that the rates are not based on cost.

20. In response to the commenters, the local exchange carriers argue that variations between the filed rates do not render the rates unreasonable. They contend that if special access services are to be based on the costs of individual exchange companies, then variations are inevitable. *See*, *e. g.*, Ameritech reply at 22; Mountain States reply at 21. "Different facilities, technologies, and configurations can be used to provide the service in different states," the exchange carriers assert.

> First, underlying cost factors are magnified, not mitigated, by the use of embedded unit cost methodology. For example, the costs of facilities performing the same function can vary significantly, depending on the price in the year of purchase, depreciation and the available technology at the time of construction (*e. g.*, analog carrier versus optical fiber).... Second, demand for total telephone service also gives rise to vastly different economies of scale.

Ameritech reply at 23. Another justification advanced is that the comparisons made by the commenters are unfair because they frequently compare the rates of very different jurisdictions, such as Washington, D. C. and Nebraska. *Id.* at 24; Mountain States reply at 21. In their nearly identical pleadings, NECA, Bell Atlantic, and Pacific Bell also respond that rate variation is not unique to special access, and that:

> [S]ubstantial rate variation exists in the OCC facilities tariffs and the intrastate private line tariffs -- the very tariffs which the parties have compared to special access in an attempt to show that the special access rates are unreasonable. Moreover, the rate variation in these other tariffs far exceeds the rate variation among special access rates.

NECA reply at 35-36.

21. The problem of rate disparity was also present in the last two sets of special access tariffs. *See February 17 Order* at para. 45; *November 9 Order* at paras. 57-62. In the *November 9 Order*, we required exchange carriers that had proposed exceptionally high or low rates to review carefully their rate development studies and correct any defective studies or estimates. *November 9 Order* at para. 62. Apparently, only three of the non-NECA BOCs — Illinois Bell, Wisconsin Bell, and Northwestern Bell (Minnesota) — believed it necessary to make such rate adjustments. Ameritech reply, however, gives us a disturbing insight into the adjustments some carriers apparently have made. In responding to IDCMA's criticism of rate disparities among the exchange carriers for 1.544 Mbps or DS-1 service, Ameritech in effect concedes that the rates reflect factors other than costs. Ameritech states that "[s]ome companies have to price their DS-1 service at higher levels in order to minimize uneconomic migration, while other companies can accomplish the same goal at lower rate levels." Ameritech reply at 26. In order to avoid "inefficient migration of customers to DS-1, the Ameritech Operating Companies have priced the service to reserve its use for those customers whose needs most suit its multi-circuit functions." *Id.* at 25.

22. We remain concerned that the wide variations in some rates may indicate that individual rates fail to reflect the costs of efficient operation. However, the variable factors affecting costs pointed out by the reply comments are genuine and we have no clear basis for singling out specific rates at this time. Further monitoring and investigation are necessary, subject to our accounting order. Particular scrutiny of the 1.544 Mbps and DS-1 rates is warranted in view of the strategic pricing policy apparently underlying those rates. We also note that a comparison of the rate adjustment factors with the range of filed rates indicates that application of those factors will reduce some of the extremely high rates[9] and narrow the variance considerably, although we have not adjusted any rate simply because it was

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[9] For example, the Ohio Bell rates which were challenged by Lexitel as particularly excessive would be reduced by 25 percent if the carrier wishes to avoid suspension.

higher than the rates for other companies.

V. VIDEO SERVICE

23. In the *February 19 Order,* the Commission reached three findings with respect to video services. First, we found that although applying the general rate structure to video service does not appear unreasonable, the record does raise a factual question regarding the routing of video services which warrants further investigation of whether a different rate structure might be preferable. Second, we found that the rate structure should continue the current practice of "topping" part-time rates at the monthly rate, but may be modified such that additional days of use may be priced at 1/30th of the monthly rate. Finally, we decided, pending investigation, to partially suspend for the five-month statutory period video rate increases reflecting half of the total revenue requirement associated with unused polyethelene shielded video (PSV) cable pairs.

24. It is this latter finding which bears on the present order. The basis for this partial suspension under Section 204(a) of the Act, 47 U.S.C. § 204(a), was that carriers have generally made no apparent effort to find alternative uses for PSV facilities, an effect for which our prior full allowance of this investment might be responsible in part. We noted that there is a disincentive to develop new uses since video transmission is a relatively inelastic service and the carriers may be able to recover the revenue requirement associated with this investment entirely from the video service category without the effort involved in developing new, economical uses. In light of the apparent potential for applying PSV facilities to other high capacity services, we concluded that it would be unfair to allow carriers to continue loading this entire investment[10] in unused facilities into the television rate base. On the other hand, we concluded that only a partial suspension was warranted because PSV cable pairs were originally included in composite cables solely to serve video users and those users have benefitted from this practice. Under these circumstances, a partial allowance of 50 percent seemed a reasonable interim approach to correct the aforementioned regulatory disincentive. If warranted after further investigation, we will

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[10] For NECA, this amount is approximately $42 million.

determine a more accurate allocation of PSV investment.

25. Carriers are, therefore, required to refile these rates to reflect the removal of revenue requirement associated with half their investment in unassigned PSV facilities.[11] The revised rates, however, should not be lower than the rates that are presently being charged for local channel service. In any case where this would occur, the carrier should demonstrate this and file its existing local channel rates; it may also revise the present provisions for "topping" part-time rates as discussed above. In making this filing, carriers must show, with reference to their earlier filings, the process by which these rates are being adjusted.[12]

26. We recognize, however, that it may be difficult for carriers to calculate the proper adjustment in the brief time allowed, particularly if they do not maintain circuit inventories and accounts in the same manner as reported by NECA, or otherwise cannot readily calculate the revenue requirements associated with unused PSV facilities. For these reasons, we will allow carriers to recalculate their rates using an average adjustment factor in lieu of filing new, full cost support for carrier-specific adjustments. NECA, which currently encompasses about half of the total industry for this service, should be a reasonable surrogate for estimating the correct adjustment for the remainder. Non-NECA customers who choose this approach should reduce their local video rates by the same proportion as NECA, *i.e.*, by the ratio of the amount of revenue requirement suspended for NECA to the total NECA local video revenue requirement. This adjustment, both for NECA and other filing carriers, should be applied to the video rates prior to, and independent of, any other rate adjustments required by this order unless, as discussed in the preceding paragraph, it would result in a rate reduction.

VI. TRANSITION TO SPECIAL ACCESS TARIFF RATES

27. As we noted in the *November 9 Order*, The Commission is faced with the difficult task of implementing just and reasonable cost-based tariff rates for special access services without causing

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[11] Investment allocated to land, buildings, and miscellaneous items associated with these facilities, as well as related operation and maintenance expenses, must be changed accordingly to reflect this partial suspension.

[12] Demand estimates should not be revised in making these adjustments. As noted previously, television is a relatively inelastic service, so the effect should be slight. Recalculations of demand would also present complicated issues which probably could not be adequately addressed to allow the revised tariffs to become effective promptly.

unjustifiable "rate shock." *November 9 Order* at para. 84. Although some questions regarding the cost support still remain and will be subject to further investigation, it is clear that cost-based special access tariff rates will be substantially higher than the rates currently paid by the OCCs pursuant to the 20099 Agreement.

28. The Commission proposed a phase-in of special access rates in its *November 9 Order* to mitigate the "rate shock" anticipated by a sudden shift from OCC rates held artifically low by the Bell Operating Companies' failure to revise them in conformity with the 20099 Agreement. The Commission's proposal, which was similar to one advanced by the Ameritech Operating Companies,[13] would require OCCs to pay 50 percent of the effective special access tariff rates for the first six months the tariffs were in effect. OCCs would then pay 75 percent of the tariff rates for the next six months. Subsequently, after special access tariffs had been in effect for one year, the OCCs would pay the full tariff rate. The transitional rates would apply only to OCC circuits activated on or before November 8, 1984. The Commission required, as an initial transitional measure, that the rates paid by OCCs for special access increased by 20 percent over the Agreement rates. Thus, as required by the *November 9 Order*, those OCCs are currently paying 20 percent over the 20099 Agreement rates and will continue to pay those rates until the special access tariffs become effective. The Commission proposed, rather than required, the second and third transitional steps, pursuant to which the OCCs would pay 50 and 75 percent of the effective tariff rates, respectively. The Commission directed the exchange carriers to file transition plans reflecting the proposal under consideration and also asked interested parties to comment on the phase-in. *November 9 Order* at para. 97.

29. In response to the Commission's directions, most of the exchange carriers filed transition plans as part of the Descriptions and Justifications (D&Js) accompanying the December 3, 1984 special access tariff filings. *See, e. g.*, NECA D&J Vol. I, Section 5. NECA states that if the Commission adopts a phase-in for OCCs (which it argues is unnecessary),[14] the transition plan could

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[13] *See* Ameritech Petition to Expedite Transition to Special Access Rates, filed August 8, 1984.

[14] NECA D&J Vol. I at 5-1 to 5-2. NECA suggests that if the proposed transition plan is adopted, the 75 percent transition rate might be implemented on June 1, 1985, rather than six months after the tariffs become effective, to "bring the change in special access transition rates into synchronization with changes in all other access rates." *Id.* at 5-3 n. 3.

be implemented by a tariff supplement. NECA and most of the exchange carriers propose to mark-up the full cost rates during the transition, allegedly to ensure that the exchange carriers recover their special access revenue requirements during that period. NECA proposes a 14.7 percent markup over full cost rates while the OCC discounted rate is 50 percent of full tariff rates, and a 6.8 percent markup while the OCC discounted rate is 75 percent of full tarriff rates.[15]

30. The proposed transition for OCCs has prompted considerable comment by interested parties. As an initial matter, the local exchange carriers, AT&T and RCI Corporation (RCI) oppose the phase-in. NECA argues that "the OCC facility rates have been in transition for nine years" and that "the Docket No. 20099 rates are obsolete." NECA D&J Vol. I at 5-1; *see also, e.g.*, C&P D&J Vol. I at 5-1; Bell of Pennsylvania and Diamond State D&J Vol. I at 5-1. RCI contends that the transition plan "unlawfully discriminates against new entrants into the interstate long distance market, such as RCI, as well as potential entrants." RCI reply at 4. In its comments on the special access tariffs, AT&T argues that the proposed phase-in is unlawfully discriminatory and unnecessary. AT&T contends that the immediate imposition of cost-based rates would neither surprise the OCCs nor cause "rate shock" because "the OCCs have known for nearly a decade that their Docket No. 20099 rates were unduly preferential and would have to be increased." AT&T comments at 19.

31. In contrast, other commenters argue that an OCC transition is not only necessary, but that the phase-in proposed by the Commission does not go far enough to protect against rate shock. In seeking a longer transition, several commenters point to large rate increases proposed under the exchange carriers' special access tariffs. MCI notes that NECA's forecasted rate increase for OCCs is 160 percent. On the other hand, according to NECA, AT&T would incur a 5 percent reduction in special access charges. MCI comments at 50; NECA D&J Vol. II, Book 2 at 9-2. The Joint Parties contend that the proposed special access tariffs would double and triple the monthly recurring charges for essential local distribution facilities, such as 4-wire voice grade services. Joint Parties comments Appendix 5 at 1. GTE Sprint calculates that its rates would quadruple and asserts that a longer transition period is needed. GTE Sprint comments at 37; *see also* TRT comments at 15-16. Moreover, GTE Sprint and others maintain

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[15] NECA D&J Vol. I at 5-3 to 5-4 and Fig. 5-1.

that no transition plan can be implemented prior to the establishment of lawful rates or the conclusion of the Commission's investigation of the special access tariffs. GTE Sprint comments at 36; Western Union comments at 69–70; Joint Parties comments, Appendix 5 at 4 n.1.

32. The phase-in for the OCCs was set for comment as a potentially useful approach to a difficult problem. It seemed to strike a reasonable balance among various private interests in a way which appeared to serve the public interest under the particular circumstances before us. The effect of the realignment and restructuring of local and long haul private line rates occasioned by the break-up of AT&T and the filing of access tariffs, combined with the carriers' proposals to bring rates up to the authorized rate of return, would result in substantial rate changes for many customers. The magnitude of the change depends upon each customer's particular use of facilities and functions, but for most customers the realignments of rates and the restructuring of the offerings should, overall, substantially offset one another. Although an increase in one rate element, such as a local access line, might appear burdensome, that line will typically be part of an end-to-end channel or network. The price of that overall facility is the important consideration for the customer, and that total price will generally reflect the smaller rate changes and offsetting reductions in other elements. Because we believe the proposed structure more fairly assesses costs to rates, these overall rates should also lead to more efficient use as customers respond to these price signals. To the extent that the rates, which remain questionable, prove upon investigation to be too high, refunds based upon our accounting order should be a fair and adequate remedy.

33. The OCCs stand in a different posture in a number of ways. They have been paying the lower, differently-structured 20099 Agreement rates for over a decade and have planned their networks and services to end users on this basis. The rate impact of an immediate increase in those rates would be much greater. To the extent the OCCs provide their own interexchange facilities, that impact would also not be offset by the expected lower AT&T long haul rates. Those rates in fact would increase the pressures on the OCCs in attempting to compete with AT&T. Potentially, if the proposed rates prove to be too high, it is possible that some OCCs could be seriously harmed before revisions and refunds could be made. This short-term harm might thus reduce possible competition in private line services in the longer run. Moreover,

because of the level of competition among the OCCs, we expect that any actual benefit to them from the phase-in will in fact be flowed through to end users.

34. Immediate implementation of such major and questionable rate increases could threaten the full competition which is our ultimate goal. With respect to the rate differential between AT&T and the OCCs, we again believe that, as limited in time, it strikes a reasonable balance. AT&T will not experience the same rate shock as the OCCs; indeed, it will apparently enjoy rates reduced from those in its interim contractual arrangements with the exchange carriers. If those rates prove too high, it can be adequately protected by a refund. In general, while we strongly agree that any unjustified rate differential should be eliminated, we also believe that it is reasonable and in the public interest to end this rate differential in more gradual stages.

35. In summary, after consideration of the various arguments made by the commenters regarding the transition to special access tariff rates, we affirm the tentative conclusions reached in our *November 9 Order.* We find that there is a need to cushion the impact on OCCs of the proposed rate increases. The proposed transition, we conclude, is a reasonable means of mitigating abrupt rate increases, which might harm the public interest, while moving toward cost-based rates. We turn next to consideration of comments addressed, not to the principle of a phase-in, but to its application, timing, and other details.

36. First, we believe that the proposed one-year period, with two six-month steps, sets a reasonable schedule. OCCs should, by this mechanism, have adequate notice from which to plan for the future. That period should also afford enough time to examine and adjust the special access rates to the extent this proves necessary. The rate differential between the OCCs and AT&T will also be relatively brief. The comments provide no specific information that a different period strikes a better balance of these interests.[16]

37. We decline to postpone the transition until after completion of our investigation of special access, as requested by GTE Sprint and other commenters. Although some questions still remain regarding the cost support and rate structures, we believe

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[16] With respect to the suggestion of some exchange carriers that any transition be synchronized with the annual tariff filings, we note that the Common Carrier Bureau recently delayed the June 1 effective date for most provisions of revised access tariffs until October 1. If revised special access tariffs become effective April 1 as we anticipate, the second stage of the transition would be synchronized with the October 1 date.

that we have gone as far as we can with our pre-tariff investigation. The OCCs will be protected by two measures while the tariffs are in place. First, the OCCs will be given substantial discounts from the tariff rates for one year. Second, we will continue our investigation and, if it is determined that the local exchange carriers have earned more than the allowable 12.75 percent rate of return on special access, customers will be able to seek refunds.

38. Related to the questions of when the transition should begin, and how long it should last, is the issue of what circuits should be subject to the transition. In the *November 9 Order*, we proposed that only circuits which were activated on or before November 8, 1984 would be eligible for the transition. We believe, again, that this strikes a reasonable balance. Only circuits actually in place will benefit from the phase-in, but only those circuits will experience the rate shock which the phase-in is largely intended to address. For new facilities, all customers would share the same rates and all would be protected by the accounting orders. While some of the arguments made for changing the date or setting it based on ordering, rather than activation, have some merit, we also conclude that the original proposal should be adopted. The delay in providing facilities cited by some commenters largely concerns AT&T services. We have no reason to impute these delays to the exchange carriers. To change the date at this point would also create considerable, unjustified confusion and administrative difficulty. Therefore, we affirm the "grandfathering" established in the *November 9 Order*. We wish to clarify that only circuits ordered under the 20099 Agreement arrangements are eligible for the transition.

39. We are unpersuaded by the arguments for extending the phase-in to customers other than the OCCs who took service under the 20099 tariffs. *See, e.g.*, ARINC comments at 16–18; Networks comments at 55–58; Dow Jones comments at 12–16.[17]

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[17] On November 20, 1984, Dow Jones petitioned the Commission to "clarify" that: (1) a phase-in of special access rates would apply to any customer that would experience large rate increases; (2) the difference in rates between two-wire and four-wire circuits should reflect cost difference; (3) channel interface costs included within station termination charges must be fully justified and should not include network design and maintenance costs in excess of the actual complexity of the circuit; and (4) exchange carriers are required to specify that mileage charges are computed on a per channel, rather than a per termination, basis. Despite its caption as a petition for clarification, Dow Jone's petition is more in the nature of comments on NECA's October 10 illustrative tariff and comments regarding the action the Commission should

Changes in the rates that are paid by interexchange carriers can have an impact upon competition in the interexchange telecommunications market which must be considered in our public interest analysis. This factor warrants giving greater weight to carrier "rate shock" than that which non-carrier customers might suffer. As the Court of Appeals for the District of Columbia Circuit recently observed, "[i]t is reasonable for the FCC to take into account the ability ~~of~~ the industry to adjust financially to changing policies." MCI Telecommunications Corporation v. FCC, No. 82-1237 (D.C. Cir. Dec. 18, 1984), slip op. at 14. Some of the carriers that have been major users of 20099 Agreement facilities could experience great difficulty in adjusting to the immediate implementation of full cost rates. Moreover, while it is possible that some non-OCC customers will face significant rate increases, many others will not. Many customers will still obtain end-to-end private line service from AT&T and, under AT&T's proposed private line restructuring, are unlikely to face "rate shock" because any increases in access-related costs are likely to be largely offset by decreases in the rates for AT&T's interoffice channels. *See, e.g.*, AT&T F.C.C. Tariff Nos. 9, 10 11, Transmittal No. 285, Description and Justification § 1 at 1-5 (adopting cost-based rates for access elements permits reductions in interoffice channel rates); NECA reply at Appendix C. Thus, as a class, the non-OCC customers are unlikely to face the rate increases confronting the OCCs that are currently taking facilities under the 20099 Agreement tariffs and the commenters have not suggested a way of determining ~~which~~ customers would face substantial rate increases and be eligible for a phase-in. Furthermore, the circumstances surrounding those OCCs and the long-unadjusted 20099 Agreement rates differ from the circumstances of other customers. Unlike the OCCs that are taking facilities under that agreement, other customers' rates have not been frozen at the 20099 Agreement level. We acknowledge the problem raised by RCI, that those OCCs with a large stock of facilities obtained under the 20099 Agreement tariffs will have some advantage vis-a-vis newer carriers seeking to expand their networks. The carriers will stand on an equal footing in ordering new facilities, however, which should limit the older OCCs' competitive advantage. We also have no specific information on the likely extent of this problem. We conclude that a one-year transition strikes a reasonable balance between RCI's concern and

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take on the currently pending special access tariffs. As such, we are considering the Dow Jones petition as comments.

the need to prevent an overnight jump to the proposed tariff rates for OCCs subject to the 20099 Agreement.

40. We also decline to extend the application of the special access transition plan to interLATA, intrastate facilities. The Joint Parties contend that the "same considerations apply to the rate increases for intrastate interLATA services, and thus these services are properly subject to the same transition plan." Joint Parties comments at 17. As the joint Parties recognize, however, the interLATA, intrastate facilities are more appropriately governed by AT&T tariffs. Moreover, in light of the changes in the rate structure and rate level of AT&T's private line offerings, it is unclear whether the Joint Parties are correct in the assumption that the same rate increases are likely. We anticipate that AT&T's ~~rate for long haul private line circuits will decrease and~~ those decreases are likely to largely offset increases in special access rates. We will consider this issue, however, in our review of ~~AT&T's~~ private line tariff filing.

41. Many commenters object to the markup proposed by some telephone companies to recover an alleged transition-related revenue shortfall. *See, e.g.*, Ad Hoc comments at 39-44; AT&T comments at 22-28; ICA comments at 8-12; JCP comments at 2-4; Lexitel comments at 14-15; MCI comments at 54-56; SATNET comments at 29 n.75; WU comments at 73. Those commenters contend that any revenue shortfall associated with an OCC transition should be borne by the local exchange carriers or the OCCs themselves and that the proposed markup "is a radical departure from historical precedent and practice." AT&T comments at 23. No explanation or justification has been given by the local exchange carriers for imposing the markup on cost-justified rates and requiring some customers to cross-subsidize others directly, the commenters argue. As an alternative to the markup, Ad Hoc and ICA recommend that the OCCs which obtain transitional discounts should be required to repay the local exchange carriers ~~for the transition-associated revenue deficiency~~, plus interest. Ad Hoc comments at 43; ICA comments at 9.

42. The markup proposed by NECA and several local exchange carriers is intended to compensate for a revenue "shortfall" expected to result from the OCC transition. This shortfall apparently is the difference between the amount of revenues a carrier may lawfully earn if its cost-justified special access revenues recovered a 12.75 percent rate of return and the total revenues that would be collected during the one-year transition period. We believe that the proposed markup of cost-based rates

cannot be justified. It would require some customers to pay a special access rate that recovers more than a 12.75 percent return in order that this rate of return might be earned by local exchange companies from the overall special access service category.

43. The Commission previously has noted that a 12.75 percent rate of return is the ceiling, not the floor, for a lawful rate of return. *See* Investigation of Divestiture and Access Related Tariffs, CC Docket No. 83-1145, Phase I, FCC 84-36, released Feb. 15, 1984, at paras. 27-29. *See also* Investigation of Divestiture and Access Related Tariffs, CC Docket No. 83-1145, Phase I, FCC 84-201, released May 15, 1984, at paras, 109, 114; *American Telephone and Telegraph Co.*, 86 FCC 2d 221, *recon. denied*, 87 FCC 2d 34 (1981), *aff'd sub nom. United States v. FCC*, 707 F.2d 610 (D.C. Cir. 1983). While denying NECA and others their requested markup may result in a rate of return below the maximum 12.75 percent level, none of the commenters has established that, overall, they will not realize a fair return during the transition period.[18]

44. We have analyzed the filings submitted by NECA and others regarding the impact of the OCC transitional rates on local exchange company revenues. Therefore, we are aware that some exchange carriers with a proportionately higher level of grandfathered circuits provided under the 20099 Agreement tariff may experience an annual rate of return for special access that is below their overall interstate rate of return. Our obligation to consider the public interest in the availability of long-term, vigorously competitive interexchange telecommunications, and to weigh the perhaps irreconcilable objectives of local exchange companies to achieve their maximum reasonable rate of return, has presented us with difficult choices. We are confident that in balancing these interests, we have enabled the local exchange companies, even with the OCC transition, to realize both total interestate revenues and special access revenues that are at just and reasonable levels. Carriers should realize an annual rate of return for special access service during the one-year transition that will be, on the whole, increasingly higher than the rate of return recovered in the past under the 20099 Agreement. However, if an exchange carrier can demonstrate that the revenues

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[18] Since there has been no showing that the exchange carriers are failing to achieve a fair rate of return, we reject the suggestion made by Ad Hoc and ICA that the OCCs be required to compensate the local exchange carriers for the transition-associated revenue deficiency, plus interest.

lost due to the OCC transition will drop the overall interstate rate of return[19] beneath the zone of reasonableness, we will consider granting special relief. *See United Telephone Co. of the Carolinas, Inc. v. FCC*, 559 F.2d 720 (D.C. Cir. 1977); *Mebane Home Telephone Co. V. FCC*, No. 75-1617 (D.C. Cir. unpublished judgment, April 30, 1976).

45. The gross disparity between just and reasonable, cost-based special access rates and the old 20099 Agreement rates has arisen because the Bell System Companies failed to revise the 20099 Agreement rates for over a decade.[20] Because the carriers have allowed the disparity to become so large, and for the other reasons we have already set forth, it is not unreasonable to require them to increase the rates in a manner allowing for some transition. It is true that this results in a rate disparity. However, the disparity is just and reasonable because it is relatively brief, is of a decreasing nature, and is necessary to avoid possibly deleterious, and perhaps irreversible, impacts on competition in the interexchange telecommunications market. "When necessary to avoid excessively burdening carriers, the gradual implementation of new rates and policies is a standard tool of the Commission." [Citations omitted]. *National Association of Regulatory Utility Commissioners v. FCC*, 737 F. 2d 1095, 1147 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3585 (Feb. 19, 1985).

46. Based on the record before us, we find the transition proposed in the *November 9 Order*, with the clarifications discussed below, is a fair approach and is just and reasonable. We therefore prescribe the proposed phase-in plan pursuant to Section 205(a) of the Act, 47 U.S.C. § 205(a). The rates for the OCC circuits taken under the 20099 Agreement which were activated on or before November 8, 1984 will be (1) 20 percent above the 20099 Agreement rates for the period of November 13, 1984, until the effective date of the special access tariffs; (2) 50 percent of the full special access tariff rate for the first six months after the effective date of the special access tariffs; and (3) 75 percent of the tariff rate for the second six months after the effective date of

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[19] *See* FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)

[20] To maintain its 20099 Agreement rates at a just and reasonable level, the former Bell System had the responsibility to submit cost-based data so that the contract rates could be revised upward. MCI Telecommunications Corp. v. FCC, 665 F.2d 1300 (1981). In 1983, the most recent year for which we have financial data for the BOCs, the annual rate of return for private line service, the category into which the 20099 Agreement fell, was reported at 6.386 percent. In 1982, the annual private line rate of return was reported at 8.038 percent.

the special access tariffs.[21] We require, however, that where the discounted tariff rate is below the rate described in (1) above, the OCC must pay the greater of the two rates. That is, if the otherwise applicable discounted tariff rate would be below the Docket No. 20099 rate plus 20 percent, the OCC would be required to pay the Docket No. 20099 rate plus 20 percent. This modification is to prevent anomalous windfalls to OCCs and is consistent with our intention to implement a transition toward cost-based special access tariff rates. We do not anticipate that this will occur often. Also, as noted above, we wish to clarify that only circuits taken under the Docket No. 20099 Settlement Agreement are subject to the transition. Therefore, local exchange carriers that did not have tariffs pursuant to the Docket 20099 Agreement are not required to implement the transition. Exchange carriers that were party to the Docket No. 20099 Settlement Agreement are required to file a transition plan as part of their revised special access tariffs.

VII. DOCKET NO. 20099 SETTLEMENT AGREEMENT AND WESTERN UNION'S PETITION FOR STAY

A. Docket No. 20099 Settlement Agreement

47. Several commenters[22] fault the new tariffs for failing to incorporate the rates set forth in the 20099 Agreement. The commenters generally contend that the Commission had neither cause nor authority to abrogate the 20099 Agreement in the *November 9 Order*. Therefore, argue the commenters, the Agreement remains in effect and its requirement of a six-month notice period for tariffs filed to replace the 20099 Agreement rates will not have been satisfied if the December 3 revisions are permitted

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[21] The "full" effective tariff rate would be used to compute the OCC transitional rate. Thus, if a new special access tariff becomes effective during the transition period, the OCC transitional rate would be 50 or 75 percent of the new "full" tariff rate.

[22] The commenters who addressed the issue were Aeronautical Radio, Inc.; the Central Station Electrical Protection Association and the National Burglar and Fire Alarm Association, filing jointly; American Satellite Co., Competitive Telecommunications Association, ITT Communications Services, Inc., RCA Communications, Inc. and Satellite Business Systems, filing jointly; MCI Telecommunications Corp.; and Lexitel.

to go into effect any sooner than June 3, 1985.

48. The commenters' reliance on the 20099 Agreement is misplaced. In the *November 9 Order*, the Commission concluded that the 20099 Agreement rates were so low that they violated Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which requires that charges for communication service be just and reasonable. The Commission also found that the 20099 rates granted the OCCs an undue preference in violation of Section 202(a) of the Act, 47 U.S.C. § 202(a), and that the rates would impose an excessive burden upon other consumers.

49. We therefore abrogated the Agreement, insofar as it related to special access, because it was no longer in the public interest, and prescribed a new rate which reflected a 20 percent increase in the 20099 rates. We based this action upon our review of the cost data supplied with the rate revisions at issue in the *November 9 Order*. While we had identified deficiencies in that data sufficient to find unlawful the higher tariff rates specifically proposed, we also noted that the data supported at least the 20 percent increase. Our abrogation and prescription also reflected the information and analyses collected in the course of our lengthy Access Tariff investigation during which we directed successive revisions and adjustments in the tariffs orginally filed in September and October of 1983. We further indicated that our decision was influenced by the fact that the 20099 rates, originally intended to be in force for eighteen months, were ten years old.

50. The *November 9 Order* also pointed out that, even if the Commission did not abrogate the 20099 Agreement and exercise its prescription power, the Agreement would nevertheless pose no obstacle to the implementation of new rates because the Agreement's terms had, in any case, been satisfied by the time of the *Order*. The Agreement required, *inter alia*, (1) that there be a six-month notice period between the filing date and the effective date of tariff revisions riled by the exchange carriers to change the 20099 Agreement rates; and (2) that such revisions be "supported as required by Part 61" of the Commission's Rules, 47 C.F.R. Part 61. We concluded in the *November 9 Order* that both of these conditions had been met.

51. This conclusion was based on the fact that, in their September and October 1983 filings, and again in the March 1984 filing at issue in the *November 9 Order*, the exchange carriers had put the OCCs on notice that the 20099 Agreement rates would be increased. In addition, our Access Charge orders had given notice

to the OCCs that new access tariffs would replace the 20099 Agreement rates. Thus, we concluded, the OCCs had received far more than the six-month notice provided for in the 20099 Agreement. We also concluded that the second condition of the 20099 Agreement had been satisfied by the cost support submitted by the carriers, despite the various problems which have required correction. The deletion in the December 3 filing of the 20099 Agreement rates from the exchange carriers' rate structure was therefore consistent with the Commission's directives in the *November 9 Order*.[23]

52. Based on our review of the information supplied with the December 3 filing, we confirm our conclusion in the *November 9 Order* that the 20099 Agreement must be abrogated as contrary to the public interest. Our abrogation is amply reinforced by the cost support and analyses submitted with the December 3 filings. That information reaffirms that the 20099 rates are so low as to be unjust, unreasonable, and unduly discriminatory. We also find that the public interest requires an immediate departure from the 20099 Agreement rates so that we may begin our implementation of a non-discriminatory, cost-based special access structure. The OCCs would have us wait until we are presented with the perfect tariff before allowing *any* increase in the 20099 Agreement rates. We have concluded that it is contrary to the public interest to permit the rate disparity created by the 20099 Agreement to continue in effect. We are satisfied that special access rates which comply with this order will be reasonable under the circumstances and will go a long way toward achieving a fully cost-based scheme of special access rates that do not create unnecessary disparities between like customers. "The best must not become the enemy of the good, as it does when the FCC delays making any determination while pursuing the perfect tariff." *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 341–42 (D.C. Cir. 1980), *cited in National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1147 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W.

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[23] To some extent, the commenters' attacks on the December 3 filings for incorporating the Commission's conclusions in the *November 9 Order* constitute, in effect, requests for reconsideration of that order. Petitions for reconsideration of the *Order* are pending and provide a more appropriate procedural forum for resolving these issues. Accordingly, we will treat the comments attacking the *November 9 Order* as petitions for reconsideration and will dispose of them in our reconsideration order.

3585 (U.S. Feb. 19, 1985).

53. Even if the 20099 Agreement still were in effect, we would find that its terms had been satisfied so that, if modified as provided by this order, the special access tariffs filed on December 3 may take effect. As we pointed out in the *November 9 Order*, the six-month notice requirement already has been satisfied by the filings which preceded the December 3 revisions and by the Commission's orders in both this docket and the Access Charge docket.[24] The OCCs have therefore received all of the notice for which they bargained, and more. In our view, to further delay implementation of special access rates, initially scheduled to take effect on January 1, 1984 pursuant to the Commission's Access Charge orders, would require a strained reading of the Agreement and would elevate its form over its substance.

54. In addition, the Agreement's cost support requirement was met by the December 3 filings (as it had been by the previous filings). The Agreement refers to tariff revisions "supported as required by Part 61 of the Commission's Rules." By using precise language and referring specifically to Part 61, we conclude that the 20099 Agreement signatories agreed only that the proposed revisions must be accompanied by the support materials described in that part of our rules, not that the revisions must receive our *imprimatur* as cost-justified or reasonable. This distinction between the support required to satisfy Part 61 of our rules and the showing necessary for a finding of lawfulness is consistent with several decisions of the Commission and the courts which were adopted before the 20099 Agreement was negotiated.[25] By filing tariff revisions on December 3 which were "supported as required by Part 61," as were the revisions filed in March of 1984, the

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[24] *See* MTS and WATS Market Structure, 93 FCC 2d 241 (1983).

[25] *See* AT&T, 42 FCC 2d 293, 300 (1973) ("[A] carrier may fail to make a *prima facie* showing of lawfulness at the time of filing tariff revisions, even though it supplies all of the data and information required by our rules"); Tariffs-Evidence, 40 FCC 2d 149, 152–53 (1973). *See also* American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970); Associated Press v. FCC, 448 F.2d 1095, 1104 (D.C. Cir. 1971) ("[T]he purpose of the Commission's rule is to provide the Commission with the information necessary to decide whether an investigation and suspension of proposed rates should be ordered; and this information may be sufficient even though it does not amount to a prima facie case").

exchange carriers complied with the 20099 Agreement.

B. *Western Union's Petition for Stay*

55. The Commission has received a petition from Western Union for a stay of our *November 9 Order* pending disposition of Western Union's appeal of that order to the Court of Appeals. AT&T, certain BOCs[26], and the Ameritech Operating Companies[27] filed oppositions to the petition. For the reasons detailed below, we conclude that Western union has failed to make the showing which would justify a grant of its petition and that its petition must therefore be denied.[28]

56. To determine whether a petition for stay should be granted, the Commission applies the four-pronged test developed by the courts for assessing stay requests.[29] The four criteria are (1) the likelihood that the petitioner will prevail on the merits; (2) whether the petitioner will be irreparably injured without such relief; (3) whether a stay would substantially harm other parties; and (4) whether a stay would be consistent with the public interest. Western Union has failed to meet any of these criteria.

57. With respect to the first criterion, Western Union claims that the *November 9 Order* most likely will be set aside by the reviewing court. Western Union argues that the *Order* unlawfully abrogated the 20099 Agreement and incorrectly found, in the alternative, that the terms of the Agreement had been satisfied in

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[26] The BOCs jointly filing in opposition to Western Union's petition are New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, the Chesapeake and Potomac Telephone Company, the Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, the Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, New York Telephone Company, New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company.

[27] The Ameritech Operating Companies are Illinois Bell Telephone Co.; Indiana Bell Telephone Co., Inc.; Michigan Bell Telephone Co.; The Ohio Bell Telephone Co.; and Wisconsin Bell, Inc.

[28] Western Union also filed a motion with the United States Court of Appeals for the District of Columbia Circuit for stay of the *November 9 Order* pending disposition of their appeal of that *Order* to the court. Applying the same standard as the Commission, the court concluded, as we do here, that no stay was warranted. The Western Union Telegraph Co. v. FCC, No. 84-1641 (D.C. Cir. Feb. 15, 1985) (order denying motion for stay).

[29] *See* Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958). *See also* Satellite TV Corp., 92 FCC 2d 1053 (1982); 47C.F.R. §§ 1.107(n), 1.429(k).

any case. We are not persuaded that Western Union's arguments are likely to prevail in the reviewing court. We believe our resolution of these issues in the *November 9 Order* was correct and amply supported by the record in this docket. *See* Section VII.A, *supra*. Accordingly, we conclude that Western Union is unlikely to prevail on the merits of its claim that the Commission's actions in the *November 9 Order* were unlawful.

58. The second criterion for determining whether a stay should be granted is whether the petitioner will be irreparably harmed without such relief. We have concluded that no irreparable injury to Western Union would result in the absence of a stay. In its petition, Western Union claims that it would be harmed "[i]f the rate increases proposed by the BOCs' Special Access tariffs filed on December 3, 1984, take effect as scheduled on January 17, 1985." Petition at 37. This claimed harm, however, does not result from the *November 9 Order*, which did not — indeed could not — authorize or allow to become effective the December 3 tariff revisions which were filed *after* the *November 9 Order* was released. Thus, a stay of the *November 9 Order* would be of little value in preventing business injuries that Western Union argues would result from the December 3 tariff revisions.

59. The *November 9 Order* also authorized a 20 percent increase in special access rates, effective November 13, and proposed the transition plan for phasing in special access rate increases. It is not clear whether Western Union is claiming that irreparable injury would result from these aspects of the *November 9 Order*.[30] To the extent that it does so claim, however, it nevertheless fails to satisfy the second criterion for a stay. Western Union's demonstration of injury relates primarily to anticipated increases contained in the December 3 filing of new special access rates, not to the 20 percent increase ordered by the Commission in the *November 9 Order*. Moreover, Western Union does not attempt to segregate the effects of the 20 percent increase from the effects of the more substantial increases contained in the December 3 filing. Finally, Western Union's acquiescence in the 20 percent increase belies any claim of irreparable injury with respect to that increase. *See* Comments of Interexchange Carriers on Ameritech Petition (Sept. 5, 1982) at 2.

60. Western Union's real concern appears to be the Commission's conclusion in the *November 9 Order* that the requirements of the 20099 Agreement had been satisfied or, alternatively, that

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[30] *See* petition for stay at 37, 38 n.1.

the Agreement must be abrogated. Even if it were possible to "stay" the Commission's conclusion, however, no irreparable injury would befall Western Union absent such a stay because of the availability of remedies under the Communications Act. If the *Order* were to be reversed by a court, it would be within the Commission's discretion to order refunds of the amounts in excess of the 20099 Agreement rates collected pursuant to the *November 9 Order*. Aggrieved parties also may seek an award of damages pursuant to Sections 206-209 of the Communications Act, 47 U.S.C. §§ 206-209. We have imposed an accounting order during the pendency of the investigation which would facilitate the award of refunds if warranted. Moreover, the phase-in of OCC rates which we have implemented in this order should minimize any harm to Western Union. Practically speaking, it represents a replacement mechanism for dealing with the concerns embodied in the 20099 Agreement, and one adapted to present circumstances.

61. The third and fourth criteria for assessing a stay request are whether a stay would substantially harm other parties and whether a stay would be consistent with the public interest. Neither of these factors support a stay in this case. In the *November 9 Order*, the Commission found that the special access rates established by the 20099 Agreement were so low that, without modification, they would be unjust, unreasonable, and would cast upon other consumers an excessive burden. If the Commission were to stay the *Order* and permit the 20099 Agreement rates to remain in effect, other parties would be harmed. The exchange carriers and AT&T would continue to feel the effects of the disparity between the 20099 rates and the new special access rates. A stay would interfere with the prompt transition to a rate structure that would not contain such disparities. Thus, a stay would substantially harm other parties. The public interest also would suffer if implementation of the *November 9 Order* were delayed by a stay. As a result of the comprehensive inquiry in the Access Charge Proceeding, the Commission determined that the public interest is best served by a rate system in which costs are recovered from the users who generate those costs and in which special access rates are fully cost-based. A stay of the *November 9 Order* would disrupt the Commission's effort to implement its new compensation scheme for interstate access to local exchange facilities and therefore would be detrimental to the public interest.[31]

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[31] We are also mindful that any delay in implementation of cost-based, nondiscriminatory special access tariffs would affect the timetable for implementa-

VIII. CONCLUSION AND IMPLEMENTATION

62. In our *February 19 Order*, we resolved issues relating to the rate structures ~~and provisions~~ of the local carriers' special access tariffs. In the present order, we resolve the remaining cost and transitional issues necessary to implement effective special access tariffs, and specify the details of how carriers are to carry out our conclusions.

63. Where our review of the tariffs and the record indicated that revisions of the tarriffs are warranted, we have fashioned remedies adapted to the factual and legal situations presented. It will be useful to summarize these findings and their legal basis. We conclude that the abrupt increase in OCC rates from the 20099 Agreement levels, based on the doubtful support information and uncertain projections, would be unjust and unreasonable. We accordingly prescribe the phase-in which we believe will be reasonable. We also direct and prescribe that carriers unbundle inside wiring costs from the CT rate element, upon a finding that the proposed bundling allocates costs unreasonably.[32] For video services, we conclude that the proposed elimination of topping would be unreasonable and state a modification which we believe would be reasonable. We have also required a number of specific revisions of tariff language and provisions in the *Feburary 14 Order*. These prescriptions are found to be reasonable pursuant to Section 205(a) of the Communications Act, 47 U.S.C. § 205(a).

64. Other decisions are based on the apparent likelihood that the filed provisions and rates are unreasonable, but more information would be necessary to make conclusive findings or prescrip-

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tion of the AT&T antitrust decree which requires the divested Bell exchange companies to offer all access services to AT&T and the OCCs under tariff and at non-discriminatory rates. *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C.1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). The district court already has had to waive the access tariff provision of the consent decree several times to permit the Commission to complete its disposition of the special access tariffs. *See, e.g.*, Order of Oct. 19, 1984, in *United States v. AT&T*.

[32] In making this adjustment, carriers should initially calculate the level of the inside wiring rate element from the amount associated with inside wiring in Account 232, and the total reported demand for all terminations. The result should be that the total charge for a CT with inside wiring will be the same as that proposed (aside from any applicable rate adjustment factor) but the rate for a CT without inside wiring will be lower. In the case of NECA, for example, this second would be about 25 percent lower. This interim approach will allow prompt implementation of the rate at a level which should not increase rates for any customers. Carriers may file adjustments to these rates subsequently, allowing normal review periods for all concerned.

tions of replacement terms. This applies to the individual rate adjustment factors discussed in Appendix A of this order. To allow revisions to those rates and the other provisions, we suspended the tariffs for one month. Suspension for the statutory five-month period and further investigation would be necessary if carriers should decide not to adjust those rates. The specific rates as adjusted represent rates which it will be reasonable to allow to become effective without further suspension. These revised rates are not prescribed for purposes of Section 205(a) of the Communications Act, 47 U.S.C. § 205(a). We believe this approach is well-adapted to identify and specify the problems in these new and problematic rate proposals, while giving the exchange carriers clear directions so as to minimize any unncessary further delay.[33] For video channel rate increases attributable to unused PSV cable pairs, we suspended the increases in part pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). Other provisions and issues are left to our continuing investigation and monitoring efforts.

65. Although we have thus reached a stage where the tariffs should become effective, we also recognize that many important issues remain to be fully addressed. Those issues will be included in our continuing investigation. However, we remain concerned, in view of the magnitude of the changes in rates and structures and the continuing problems and possible inaccuracies in the rate development process, that the rates may nevertheless be excessive, despite the adjustments required here. Although we will be monitoring the results that are produced by these tariffs and will order refunds if we find that the rates are likely to be excessive, the existence of such investigation does not relieve any carrier of its continuing obligation to revise rates on its own initiative if it finds that the rates have produced a return that exceeds the authorized rate of return.

66. The adjustments to the rates that will be sufficient to enable us to permit the tariffs to become effective without suspension are necessarily approximate and depend in large part on the accuracy of the underlying data supplied by the many filing carriers and of their projections for the future. If actual operating experience shows that in some instances carriers exceed the allowed return, their statutory obligation to maintain reasonable rates, under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), justifies requiring the carriers to file promptly to

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[33] *See* Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978).

reduce their rates accordingly. The adjustments described in this order are based on our present view of costs and future developments. We recognize that better information will become available and circumstances will change. For these reasons, we are not requiring the carriers to maintain the rates adjusted for any specific period (with the partial exception of the transitional OCC rate phase-in). Just as it is not our intent to give carriers an indefinite opportunity to charge rates which they discover to be excessive, we also do not seek to lock carriers into rates which are noncompensatory. Carriers may, at any time after the effectiveness of the initial special access tariffs, propose changes in those tariffs by means of ordinary tariff transmittals accompanied by the support information required by our rules. In the event that carriers do earn more than the allowed rate of return, and have failed properly to reduce their rates, we will take steps to provide refunds.

67. In addition, in ord~~er to ensure that customers will in fact be~~ protected, we also require that carriers keep accounts of the special access charges in order to permit accurate refunds, if necessary. This accounting order will last until revised special access tariffs, based upon updated cost and demand figures, become effective. We expect this to be a relatively brief period, until the upcoming annual access tariff filings are submitted and adequately reviewed. The carriers are directed to maintain specific accounts of the non-recurring charges.

68. This order also, in a practical fashion, seeks to end the current disparate rates charged to AT&T and the OCCs. Although various commenters urge shorter or longer transition periods, we conclude that the proposed one-year transition achieves a reasonable accommodation of the conflicting goals of ending this disparity and preventing the possible injury to competition that more immediate implementation of these still-questionable rates might cause.

69. Because we wish to implement special access tariffs promptly for all carriers, we are describing the tariff revisions (other than revisions described in our *February 19 Order*) that carriers must make to enable us to permit special access tariffs to become effective without suspension. These are the specific changes that carriers should make in their filings:

> a. For carriers listed in Attachment A of Appendix A, a supplement should be filed stating that each rate in the tariff shall be multiplied by the applicable rate adjustment factor to obtain the actual rate owed. For local exchange carriers formerly subject to the 20099 Agreement, the

supplement shall also state that the rate for circuits activated on or before November 8, 1984 is one half this adjusted rate. Carriers that obtain facilities pursuant to the 20099 Agreement tariffs that are not subject to Attachment A adjustments should also file appropriate supplements.

b. Carriers may refile revised individual rates if they prefer, instead of a supplement. If the carrier wishes to do so, it shall file with the transmittal a side-by-side list showing all pending rates, the rate adjustment factor applied to each rate, and the revised, adjusted rate. The carriers shall also file revised tariff pages with symbolization as required by our rules.

c. Carriers should modify the Channel Termination rate element by the removal or reallocation of the revenue requirement associated with inside wiring in Account 232. The Channel Termination rates should be reduced by the proportion these cost allocations represent of the total costs allocated to Channel Termination in the carrier's December filing. Each filing carrier shall specify in its support material the amount of these costs as stated in its March and December filings, give specific references, demonstrate its recalculation of the Channel Termination rates, and explain that calculation. Carriers may file a separate rate element for inside wiring that will be assessed in conjunction with Channel Terminations that are associated with inside wiring. The initial charge that is filed should be equal to the difference between the Channel Termination charge proposed on December 3 and the revised initial Channel Termination charge. Carriers may, of course, file revised charges for the inside wiring element at a later date that reflect the full amount of the inside wiring costs.

d. The proposed local video rates are suspended for five months. In order to implement the partial suspension, carriers should reduce the rates for full-time and part-time video transmission by an amount equivalent to the removal of one half the carrier's revenue requirement associated with unassigned PSV facilities, at levels of demand no lower than those stated in the December filings. A description and explanation of this calculation, with references to the March and December filings, should be provided. Alternatively, non-NECA carriers may reduce their local channel rates by the same proportion required of NECA, without filing of cost support. Carriers may not eliminate "topping" of video or program audio local channel rates, but may modify "topping" at the monthly rates to charge daily rates up to 1/30th of the monthly rate for additional days of use after the monthly rate has been reached. Pacific Northwest Bell is directed to remove its proposed video rates and replace them with the rates in AT&T's Tariff F.C.C. No. 260. It may also propose the modified "topping" plan described above.

e. The tariff filings shall not include any surcharges that purport to recover costs attributable to the phase-in of special access rates for 20099 Agreement facilities.

f. Carriers are also required to make the changes specified in the Commission Order in this docket released February 19, 1985.

g. Carriers are directed to file a transmittal implementing only the revisions required or permitted by the order by March 15, 1985 to become effective April 1, 1985. Carriers who are unable to file their revisions by March 15 may request a waiver of this requirement in order to file at a later date, provided that they also defer the effective date of their pending special access tariffs for an equivalent period past April 1.

70. As a result of this order and the tariffs filed to comply, we have concluded the intitial tasks we set for ourselves in establishing this investigation of the access and divestiture related tariffs in October 1983. All of the provisions of all the access tariffs will have become effective. All of the proposed AT&T and copycat tariffs have been reviewed and acted on. The various compensation mechanisms within the former Bell System and between local exchange companies and the OCCs will have been replaced by a single, unified system of tariffs offering both switched and other, special access services and facilities. Much, of course, remains to be done. Aside from the continuing review of tariffs and proposed revisions, many issues in these very complicated tariffs remain to be more thoroughly addressed with the benefit of actual experience. Our monitoring programs need to be implemented. Further changes in circumstances and rules adopted to deal with those circumstances are inevitable. Specificially for special access, we have in this and earlier orders identified a number of issues which will be subject to continuing investigation, including specific rates. In short, the major initial effort of achieving workable tariffs has now been completed, despite the need for continuing fine-tuning, investigation, and oversight.

71. We thus find this a proper occasion to terminate the omnibus CC Docket No. 83-1145 proceeding. The conclusions, precedents, and specific directions in the many massive orders in this 16-month proceeding will continue as a solid foundation for later proceedings, but those proceedings should in the future be on a smaller scale, more narrowly focused on specific issues, carriers, and customer concerns. Those proceedings will be designated in later orders, including a forthcoming order which will designate issues for our continuing investigation of special access.

IX. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), that the rate increases for local video channels filed in the tariffs considered herein are suspended in part for five months from the present scheduled effective date and all other proposed material is

suspended until April 1, 1985.

73. IT IS FURTHER ORDERED that all carriers filing special access tariffs shall file revised tariff material in compliance with this order and our order released February 19, 1985 no later than March 15, 1985, with a scheduled effective date of April 1, 1985.

74. IT IS FURTHER ORDERED that, at the same time as the revised tariff material is filed, all carriers must issue a supplement reflecting that all special access tariff material previously filed has been suspended.

75. IT IS FURTHER ORDERED that the existing arrangements and contracts between American Telephone and Telegraph Company and the exchange carriers are to be extended until the special access tariffs become effective.

76. IT IS FURTHER ORDERED that the exchange carriers file supplements deferring their withdrawal as issuing carriers in the 20099 Agreement tariffs and B.S.O.C. Tariff F.C.C. Nos. 3 and 4 to April 1, 1985.

77. IT IS FURTHER ORDERED that American Telephone and Telegraph Company file supplements to its private line tariffs deferring the deletion of the exchange carriers as concurring carriers until April 1, 1985.

78. IT IS FURTHER ORDERED, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), that all carriers filing special access tariffs shall keep accurate account of amounts received under the special access tariffs, including a separate amount for non-recurring charges, until and unless revised charges become effective, or until further Commission order.

79. IT IS FURTHER ORDERED that for the purposes of this order, Sections 61.56, 61.58, 61.59 of the Commission Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

March 13, 1985

Re: Investigation of Access and Divestiture Related Tariffs. CC Docket No. 83-1145, Phase I and Phase II, Part 1

DISSENTING STATEMENT OF COMMISSIONERS MIMI WEYFORTH DAWSON AND HENRY M. RIVERA

We dissent to that portion of the majority's opinion that permits the local exchange carriers to effectively double the existing non-recurring charges (NRCs). The carriers have failed to file any cost support for these increases and have ~~not adequat~~ely justified a change in rate ~~structure~~ to apply these rates ~~on a per~~ termination rather than ~~on a per circuit basis.~~

Section 204 of the Communications Act, 47 U.S.C. 204, and Section 61.38 of the Commission's rules, 47 C.F.R. Section 61.38, place the burden of proof on the carriers to show that an increased rate is just and reasonable.[1] Clearly, the carriers have failed to meet this burden in this instance; indeed, they have failed even to make an attempt. This failure on the part of the carriers to provide any cost support materials is particularly egregious in this case since the issue of non-recurring charges has been a continuing source of controversy and the carriers have had three opportunities to file special access tariffs with proper justification.

This is not to say that an increase in the existing rates may not be justifiable. However, the Commission creates improper incentives and accepts inappropriate responsibilities when it removes the burden of cost justification from the carriers and takes upon itself the task of rationalizing a rate increase, even on an interim basis. This is particularly true when the permitted increase is based purely on our speculation that "these costs are *likely* to have increased substantially" over the last ten years. *Majority Opinion* at para. 18 (emphasis added).

For these reasons, we believe the Commission should have rejected the proposed increase and maintained the existing level of non-recurring charges on an effective per circuit basis until such time as fully justified increases are filed by the carriers.[2] This approach would have been particularly sound at this time given the importance of assuring, to the maximum extent possible, that the first post-Divestiture special access rates are reasonable and soundly based.

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[1] *See, e.g., Tariffs-Evidence*, 40 F.C.C.2d 149, 151-52 (1973).

[2] This is how the Commission has handled non-recurring charges for switched access service. In its *ECA Tariff Order*, Investigation of Access and Divestiture Related Tariffs, 97 F.C.C.2d 1082 (1984), *reconsideration granted in part*, _____ F.C.C.2d _____, (FCC 85-69, released February 25, 1985), the Commission directed the carriers, on an interim basis, to file non-recurring charges no higher than the existing charges under the OCC Facility tariffs. This allowed the status quo to continue until the carriers had properly justified a rate increase. With regard to non-recurring charges related to switched access service, the Commission reaffirmed the use of the OCC Facility tariff rate, on an interim basis, in its recent reconsideration of the *ECA Tariff Order*, *Id.* The Commission also stated in that Order, however, that carriers could change these rates by filing fully supported, nondiscriminatory charges.

Equipment Authorization
Low Power Communication Devices
Radio Frequency Device, Authorization

Report and Order adopted amending Part 15 of the Rules to permit the operation of low power communication devices in the 1.6 to 10 MHz band, including wideband and/or swept frequency devices. The regulations specify which form of equipment authorization should be obtained and which technical standards should be met, prior to use or marketing. They also allow the operation of wideband and/or swept frequency systems.

— *Amendment of Part 15*
Gen Docket 85-129

FCC 86-23

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
The amendment of Part 15 of the Commission's Rules to permit the operation of low power communication devices in the 1.6-10 MHz band	Gen Docket 85-129 RM-4427

REPORT AND ORDER

Adopted: January 14, 1986; Released: January 23, 1986

BY THE COMMISSION:

Introduction and Summary

1. This proceeding was initiated in response to a petition for rule making filed by the Knogo Corporation (Knogo)[1] with respect to the Commission's Rules[2] affecting the operation of wideband

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[1] *See Petition for Rule Making*, RM-4427 (Public Notice, April 19, 1983, Report No. 1401).

[2] *See* 47 CFR Part 15, Subpart F. *See* in particular § 15.305.

swept frequency field disturbance sensors[3] (WBSS) in the upper MF and lower HF regions of the spectrum.[4] Knogo, in its petition, disputed the suitability of the Commission's Rules for WBSS, and in particular, the low permissible field strength levels imposed on operation in the 2-10 MHz band, and requested that technical standards which yield a more efficient use of such systems be established.

2. More specifically, Knogo stated that WBSS could be operated efficiently, under the current rules, only in the three following bands: 1.7-2.3, 4.05-4.95, and 7.4-9.0 MHz. At other frequencies in the range of interest, Knogo contended that the field strength limit imposed by the Commission, of 15 uV/m at a distance of the wavelength divided by 2 pi was too difficult to meet whereas, in the three bands previously listed, the allowable limit of 100 uV/m at 30 meters assured enough flexibility to design efficient and economic systems. Also, Knogo indicated that it had voluntarily restricted the design of its systems to the 1.7-2.3 MHz band in order to avoid multi-user interference problems (false alarms, etc.) with equipment manufactured by its competitors which, for the most part, is designed in the two upper bands. Knogo argued that the regulations enforced by the Commission unjustly limited its share of the marketplace and its desire to respond to the growing demand for more sophisticated and inexpensive systems. Knogo urged the Commission to amend its rules by allowing the operation of WBSS anywhere from 2 to 10 MHz subject to an in-band field strength limit of 100 uV/m at a distance of 30 meters. Such a rule change, Knogo maintained, would provide design flexibility, and would continue to assure a low incidence of interference between multi-users and to authorized radio services.

3. In response to the subject petition, the Commission released a *Notice of Proposed Rule Making* (*Notice*)[5] in which it acknowledged the difficulties imposed by the technical requirements in teh 2-10 MHz frequency range, and offered solutions to some of

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[3] A field disturbance sensor is defind in 47 CFR § 15.4(j) as a device which establishes a radio frequency (RF) field in its vicinity and detects changes in that field resulting from the movement of persons or objects within the RF field. Examples are sensors for automatic door openers in commercial establishments, intrusion detectors, and anti-shoplifting equipment for retail stores. Wide band swept frequency field disturbance sensors (WBSS) utilize larger bandwidth than conventional equipment in order to assure a better detection of objects.

[4] The MF or Medium Frequency range of the spectrum is from 300 kHz to 3 MHz. The HF or High Frequency range of the spectrum is from 3 to 30 MHz.

[5] 50 Fed. Reg. 19551, FCC 85-212, 100 FCC2d 1119 (1985).

the problems enumerated in the Knogo petition. In light of the fact that no provisions for the non-licensed operation of low power communication devices (LPCDs)[6] in the upper MF and lower HF regions of the spectrum had been made,[7] and that other manufacturers had shown an interest in designing Part 15 devices in the frequency range of interest,[8] the Commission expanded the scope of the petition and proposed, in the *Notice*, technical standards which would allow the use of any LPCD from 1.6 to 10 MHz, including wideband and/or swept frequency devices.

4. Most comments on the *Notice* were very supportive of the Commission's proposals. Strong support was received from small manufacturers of security and alarm systms which have not been able, in the past, to compete with the larger industrial concerns because of the limited available frequencies and the high cost of designing similar systems in other regions of the spectrum. The *Notice* was also viewed as a responsive approach to technological innovation and an attempt at establishing uniform specifications with other countries since many American manufacturers of security devices, such as Knogo, also sell on the European or Canadian markets. The *Notice* was not only considered to provide for the needs of the security device industry, but also the low power communication device market. Many new consumer applications in the 1.6–10 0MHz band, such as in-house data communication services, remote controllers, real estate advertising services, and low power AM radio services on college campuses, can evolve from the Commission's expansion of the scope of this proceeding beyond that of the Knogo petition.

5. Some parties expressed concern over possible interference problems between the operation of non-licensed LPCDs and authorized radio services, and measures that the Commission would take if such problems occurred. The major topics addressed in the comments were operating characteristics, interference

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[6] A low power communication device (LPCD) is defined under 47 CFR § 15.4(f) as a restricted radiation device (i. e. a device in which the generation of RF energy is intentional), exclusive of those employing conducted or guided RF techniques, used for the transmission of signs, signals (including control signals), writing, images, and sound or intelligence of any nature by radiation of electromagnetic energy.

[7] Under the present rules general purpose LPCDs can be operated at any frequency below 1600 kHz (except from 490 to 510 kHz), from 26.995 to 27.255 MHz (six channels only), from 49.830 to 49.890 MHz (five channels only), at 40.66 MHz, or any frequency above 70 MHz.

[8] *See Order Granting Waiver*, FCC 81-322, released July 21, 1981, (dealing with the operation of low power communication system at 2.5 and 6.0 MHz for the purpose of identifying individual cows). *See also* letter from CX Inc. to FCC, Technical Standards Branch, dated February 25, 1985.

control, and methods of measurements. A list of the parties who filed comments and reply comments to the *Notice* is given in Apendix A. The new rules adopted herein acknowledge, to the extent practicable, the comments filed, and are specified in Appendix B.

Operating Characteristics

6. In the past decade, the industry has found the MF and HF regions of the spectrum technologically and economically attractive for the operation of WBSS, especially for security and control applications in which plastic tags are placed on the objects to monitor. In this proceeding, we focus on the 1.6 to 10 MHz range and on possible ways to make more efficient and effective use of the radio spectrum by the industry. We have received requests in this and other proceedings to examine the possibility of opening the 10–25 MHz range of the spectrum for the use of LPCDs.[9] However, as was stated in the *Notice*, due to the limited amount of information available at this time regarding the impact of such operation, we shall consider the higher part of the frequency range in question at a later date. In the *Notice*, in order to allow more flexible and efficient utilization of the 1.6 to 10 MHz frequency range, we proposed not only the operation of WBSS, but also of any LPCD, as long as specific field strength and conducted voltage levels were not exceeded.

7. We proposed emission limits on the operation of LPCDs from 1.6 to 10 MHz which, we believe, minimize the interference potential to authorized radio services regardless of the modulation technique utilized. A field strength limit of 100 uV/m at 30 meters in-band, and a conduction limit of 250 uV from 450 kHz to 30 MHz were advanced. The out-of-band field strength limits proposed were considerd equivalent to those listed under §§ 15.830 and 15.832. It is important to note that these field strength limits were derived in order to protect the licensed radio services from consumer products used in any type of environment, and predominantly, residential areas (where interference problems are more likelyto occur).

8. Although most parties supported the operation of general purpose LPCDs within the subject frequency range, in accordance with the proposed technical standards, the Consumer Electronics Group of the Electronics Industries Association (EIA/CEG) and

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[9] *See* comments from Schlage Electronics in Gen. Docket 20620. *See also* comments of 3M in this proceeding.

the Association of Federal Communications Consulting Engineers (AFCCE) questioned the necessity of allowing LPCDs from 1.6 to 1.705 MHz in view of the expansion of the AM broadcasting band by 1990.[10] We note that non-licensed AM transmitters which are used for advertising purposes by real estate companies, radio tunnel services, and on college campuses, etc. are already permitted to operate below 1.6 MHz under 47 CFR §§ 15.111-113, and have not created problems for broadcasters. We also note that the broadcasting and public safety communities, whose services could also be affected from the operation of LPCDs, have not objected to our proposal. However, we understand the concerns of EIA and AFCCE. In view of the fact that quite diverse LPCDs could be operated under the new rules, we shall account for the coming expansion of the AM broadcasting serivces by specifying for the time being, a lower field strength than the one proposed in the *Notice*. More specifically, the limits specified in §§ 15.111 and 15.113 shall apply to the non-licensed operation of LPCDs from 1.6 to 1.705 MHz. Of course, all uses of the band 535-1705 kHz are subject to whatever steps the Commission may take to improve the AM broadcasting service.

9. The Amateur Radio Relay League, Inc. (ARRL) recommended that the operation of LPCDs be restricted to industrial, commercial, or business applications. The potential for interference, the ARRL stated, increases in residential areas due to the geographic proximity to amateur radio receivers which are very sensitive to noise. Further, the ARRL suggested that, preferably, the operation of LPCDs in the 1.8-2.0, 3.5-4.0, and 7.0-7.3 MHz bands should be prohibited. While the ARRL claimed that LPCDs operating in the 3.5-4.0 MHz range will be a great source of interference to its services of interest, Mr. Richmond, an amateur radio operator, stated, to the contrary, that LPCDs will most likely be the victims in any interference situation. In view of the fact that amateur radio services operate with much greater power than LPCDs and that the field strength levels proposed for the use of LPCDs in the subject frequency range are below ambient noise, we believe that Mr. Richmond's comments represent a more accurate desciption of an interference case. The same reasoning can also be applied to the 1.8-2.0 and 7.0-7.3 MHz bands since conditions similar to the ones under the 3.5-4.0 MHz band are present in those frequency ranges. It is significant to note that

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[10] *See* Gen. Docket 84-467 (dealing with the preparation for an International Telecommunication Union Region 2 Administrative Radio Conference for the planning of broadcasting in the 1605-1705 kHz band).

the principal operating condition of LPCDs under Part 15 is a non-interference requirement to authorized radio services. As Mr. Richmond pointed out in his comments, the primary difficulty would thus seem to lie actually in the acceptance by LPCD operators of any interference caused by the operation of authorized radio services.

10. Another question of importance is whether the prescribed field strength limits within that range will be adequate if a proliferation of equipment occurs. We believe that the limits adopted herein will serve such a purpose, especially in view of the fact that they are below typical man-made ambient noise levels found in rural, commercial, industrial, or residential areas within that frequency range.[11] Also, the current rules already allow the use of thse bands at lower field strength levels, but without any restriction on the conducted voltage levels.[12] It is important to note that conducted intereference is more characteristic than radiated interference at frequencies below 30 MHz. Therefore, our proposal to restrict the conducted voltage levels and to slightly increase the permissible field strength levels should not have adverse consequences. Further, our Field Operations Bureau (FOB) undertook a broad investigation in parallel with this proceeding in an attempt to assure that FCC authorized WBSS are still operating within the framework of the regulations, and that similar transmissions in the frequency range in question do not interfere with amateur and other radio services.[13] This investigation was aided by radio amateur and other amateur groups. The study concludes that there is little chance of interference being cause to authorized communication users.

11. In the *Notice*, we proposed the utilization of any type of modulation technique, emission (with the exception of damped waves, as specified under §§ 2.201(f) and 15.105), and bandwidth for LPCDs in the 1.6-10 MHz range.[14] Such a proposition was based on our objectives to enhance technological innovation and to encourage more efficient designs. The National Telecommunica-

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[11] Cf. CCIR (French acronym for International Radio Consultative Committee) Report No. 258-4, "Man-made Radio Noise," (1982).

[12] *See* 47 CFR §§ 15.7 and 15.305.

[13] *See* FOB Memorandum from Chief of the Inspections & Investigations Branch to Assistant Chief of the Enforcement Division, re. "Report regarding field disturbance sensors — Docket 85-129," dated November 12, 1985.

[14] A damped wave is generally defined as a wave in which, at every point, the amplitude of each sinusoidal component is a decreasing function of the time. *See* Institute of Electrical and Electronics Engineers (IEEE) Standard Dictionary of Electrical and Electronics Terms, IEEE centennial edition, ANSI/IEEE Std. 100-1984.

tions and Information Administration (NTIA), an arm of the Department of Commerce, was the only party which questioned the use of any modulation technique. Earlier in this proceeding, NTIA suggested that only LPCDs using a sweep of at least ±5% of the fundamental frequency be allowed to operate due to the increased likelihood of interference to government aeronautical, maritime mobile and other services from narrowband or stationary signals in the 2–10 MHz range. We believe that lowering the permissible field strength level for devices using less than a ±5% bandwidth centered on the carrier frequency will answer NTIA's concerns. As indicated in § 15.114(b) of Appendix B, we shall limit the field strength levels for narrowband systems or devices sweeping less than ±5% of the center frequency from 1.705 to 10 MHz to 15 uV/m or the (bandwidth of the deivce in kHz)/(center frequency of the device in MHz) uV/m at a distance of 30 meters, whichever is higher. Most of the equipment utilized under the authorized radio services from 1.6 to 10 MHz employs amplitued or frequency modulation techniques (AM or FM) with narrow bandwidth. We must, therefore, emphasize that the type of emissions or modulation techniques chosen by a manufacturer should be such as not to increase the risk of interference to and from narrowband AM and FM modulated signals, and other modulation techniques utilized by the authorized radio services. This should be observed especially for one-of-a-kind systems which are known to be located near authorized (government and non-government) radio service installations.

Interference Control

12. As stated in § 15.3, the operation of Part 15 devices, including LPCDs authorized under this proceeding, must be on a non-interference basis to authorized radio services. Moreover, Part 15 devices must accept any interference received from the operation of authorized radio services. To further enforce this policy, we shall require, as we have done in the past for other Part 15 LPCDs, that manufacturers place a statement in the instruction manual and/or a label on the device attesting to such operating conditions.[15] *See* § 15.132, as amended in this proceeding.

13. The same marketing regulations applied normally to Part 15 transmitters will be used. That is, certification shall be required from any party assuming the responsibility of marketing

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[15] *See* 47 CFR §§ 15.131–133.

an LPCD in the 1.6 to 10 MHz range under Part 15. Certification is a grant of authorization issued by the Commission based on representation and test data submitted by the applicant. The FCC may also require the applicant to submit one or more sample units for further testing. Certification attaches to all subsequently produced units which are identical. An application FCC Form 731, reports of measurements, photographs, etc. are usually required to be filed for certification. Certain changes in certified equipment are also permitted without the need for FCC authorization.[16] In view of the relaxation of the rules, we shall rely heavily on the certification procedure and on our sampling program to assure continued compliance and low incidences of interference.

Methods of Measurements

14. Dash, Straus and Goodhue, Inc. recommended that the Commission adopt, for measurements below 30 MHz, procedures similar to the ones utilized by foreign government agencies such as the Germ an FTZ (*F*ernmeldde*t*echnisches *Z*entralamt). The measurement techniques used by the FCC laboratory are similar to those used by the FTZ. The major difference is that the FCC evaluates the rate of decay of the fields for each device and frequency whereas the FTZ assumes a given rate of decay.[17] The FCC technique gives a more accurate recording of how the field strength levels are propagated through space, and should, therefore, be continued.

15. Measurements should be undertaken on an open field site or a site which assures repeatable results. The Commission will test equipment using a loop antenna at frequencies below 30 MHz, and a half-wave, turned dipole at frequencies above 30 MHz. The Commission will be halting the sweep of WBSS when undertaking measurements. For conducted voltage measurements, the relevant guidelines in MP-4, "FCC Methods of Measurements of Radio Noise Emissions from Computing Devices," shall be followed. The appropriate sections of MP-1, "FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers," and OST Bulletin No. 55, "Characteristics of Open Field Test Sites," should be consulted for guidance in the area of field strength measurements. For calculating rates of decay and for field strength measurements

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[16] *See* 47 CFR §§ 2.1031-1045 for additional information.

[17] The FTZ assumes the following attenuation factors: 1) below 1 MHz, the inverse distance cubed, 2) from 1 to 10 MHz, the inverse distance squared, and 3) above 10 MHz, the inverse distance.

below 30 MHz, FCC/OST bulletin MP-5, "Methods for Measurements of Radio Noise Emissions from Industrial, Scientific, and Medical Equipment," should also be consulted for guidelines. It is important to note that at frequencies below 30 MHz the test site described in OST Bulletin No. 55 may lead to some reading errors due to the approximations made. We recognize also that other measurement errors will occur when testing WBSS due to the fact that we shall be halting their sweep. However, such measures are necessary pending further development of measurement techniques and the procurement of instrumentation by the FCC laboratory which will help us involving such problems. Measurement procedures applicable to wideband emissions are currently being studied. Parties undertaking measurements are advised to discuss the matter with the FCC Sampling and Measurements Branch, (tel: (301) 725-1585), prior to submitting their filings.

Final Regulatory Analysis

16. Pursuant to 5 U.S.C. 601 *et seq.*, and Initial Regulatory Flexibility Analysis was incorporated in paragraph 11 of the Notice of Proposed Rule Making. In paragraph 11 of the Notice, written comments on this Analysis were solicited. No comments in response to this request were received.

I. Reason for action

This proceeding is in response to a petition for rule making requesting that additional frequencies be allowed for the operation of wideband swept frequency field disturbance sensors.

II. The objective

The objective of this proceeding is to enhance the use of new technology for low power communication devices in the 1.6-10 MHz band without increasing the interference potential to authorized radio services.

III. Legal basis

The action proposed is in accordance with Section 4(i), 302(a), 303(g), and 303(r) of the Communications Act of 1934, as amended, which permit the Commission to make reasonable regulations governing the interference potential of radio frequency equipment and to promote the larger and more effective use of radio in the public interest.

IV. Entities affected; nature of economic impact; significant alternatives

This action is expected to have a beneficial economic impact on manufacturers since it will allow greater design flexibility. No significant alternatives are apparent at this time.

V. Recording, record-keeping and other compliance requirements

None beyond that required under the existing regulations.

Ordering Clauses

17. Accordingly, IT IS ORDERED that, pursuant to §§ 1, 4(i), 302, and 303 of the Communications Act of 1934, as amended, Part 15 IS AMENDED, as shown in Appendix B, effective March 3, 1986. IT IS ALSO ORDERED that cow identification systems authorized under the terms of the Order referenced in footnote 8, below, are hereby grandfathered, subject only to compliance with 47 CFR §§ 15.3 and 15.103. IT IS FURTHER ORDERED that this proceeding is terminated. For further information on this proceeding, contact Liliane Volcy, Office of Science and Technology, tel: (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX B

47 CFR Part 15 is amended as follows:

1. The authority citation for Secs. 15.111 and 15.113 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise note. Interpret or apply Sec. 301, 48 Stat. 1081; 47 U.S.C. 301.

2. In Part 15, Secs. 15.111 and 15.113 are amended by removing the number "1600" and inserting in its place the number "1705".

3. In Part 15, the current § 15.115 is removed and the current § 15.114 is

redesignated as § 15.115.

4. In Part 15, a new § 15.114 is added to read as follows:

§ 15.114 Operation between 1.705 and 10 MHz (including swept frequency).

A low power communication device, including one which utilizes swept frequency techniques, may be operated in the 1.705 to 10 MHz band, provided it meets the following requirements:

(a) Operation shall be confined to the 1.705 to 10 MHz band.

(b) For devices with a bandwith at least ±5% of the center frequency, the field strength of emissions from 1.705 to 10 MHz shall not exceed 100 uV/m at 30 meters. For devices with a bandwidth less than ±5% of the center frequency, the field strength of emissions from 1.705 to 10 MHz shall not exceed 15 uV/m or (the bandwidth of the device in kHz)/(the center frequency of the device in MHz) uV/m at a distance of 30 meters, whichever is higher. *Note*: For the purposes of this Section, bandwidth is determined at the points 6 dB down from the modulated carrier.

(c) The field strength of emissions outside the 1.705–10 MHz band shall not exceed:

Frequency Range (MHz)	Distance (meters)	Field Strength (uV/m)
below 88	30	10
88 to 216	30	15
above 216	30	20

(d) A low power communication device which is designed to be connected to a public utility power line shall limit the radio frequency voltage conducted back into the power lines to not more than 250 uV over the frequency rangte 450 kHz to 30 MHz. A 50 uH/50 Ohm LISN shall be used to measure the conducted voltage levels, as specified in the appropriate sections of MP-4, "FCC Methods of Measurements of Radio Noise Emissions from Computing Devices."

5. The authority citation for Sec. 15.114 is amended to read as follows:

Authority: Secs. 4, 302, 303, 48 Stat., as amended, and 82 Stat., 1066, 290, 1082; 47 U.S.C. 154, 302, 303, unless otherwise noted.

6. The authority citation for Secs. 15.132, 15.141 and 15.142 continues to read as follows:

Authority: Secs. 4, 303, 307, 48 Stat., as amended, 1066, 1082, 1083; 47 U.S.C. 154, 303, 307.

7. In Part 15, a new paragraph (d) is added to § 15.132 to read as follows:

§ 15.132 Labelling and identification requirements.

* * * * *

(d) When it is not practicable to affix the label required under this section due to the size, use of the device, or other factors, the wording specified under paragraph (a) or (b) above and the FCC identifier (when applicable) shall, as an alternative, be placed on the first page of the instruction manual or a pamphlet given to the user.

8. In Part 15, paragraph (a) of § 15.141 is revised and a new paragraph (d) is added to read as follows:

§ 15.141 Measurement procedure.

(a) Any procedure acceptable to the Commission may be used to measure the RF energy emitted or conducted by a low power communication device. For swept frequency equipment, measurements shall be made with the frequency sweep stopped. Field strength measurements shall be made, to the extent possible, on an open field site.

* * *

(d) For devices operating between 1.705 and 10 MHz, the following shall be observed:

(1) The minimum bandwidth of the measuring instrumentation shall be:
— 200 Hz for measurements below 150kHz
— 9 kHz for measurements from 150 kHz to 30 MHz
— 100 kHz for measurements from 30 to 300 MHz

(2) The antenna to be used for field strength measurements shall be:
— below 18 MHz, a shielded balance loop
— from 18 to 30 MHz, a shielded balanced loop or calibrated tuned half-wave dipole
— from 30 to 300 MHz, a calibrated tuned half-wave dipole

Construction Additional Time
Construction Period
Construction Permit Expiration of
Construction Permit Extension of
Construction Permit Modification of

The Commission extended the time period for construction of b/c stations. However, stricter criteria for the granting of applications to extend the time to construct broadcast facilities and for granting modifications and assignment-/transfers were adopted to avoid unwarranted delays and expedite service to the public. These criteria were not imposed on Instructional TV Fixed and International Broadcast stations.
— *Amendment of Sec. 73.3598*

FCC 85-647

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 73.3598 and
associated rules concerning the
construction of broadcast stations.

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1985; Released: December 17, 1985

BY THE COMMISSION:

1. The matter before us is the amount of time taken by broadcast permittees to construct their facilities. Currently, Section 73.3598 of the Commission Rules provides that the period for construction of television and radio broadcast stations is 18 and 12 months, respectively. The latter period also applies to other broadcast, auxiliary and Instructional TV Fixed (ITFS) stations.[1]

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[1] Specifically, this provision (Rule 73.3598(b)) includes International Broadcast, low power TV, TV translator, FM translator, FM booster and broadcast auxiliary. Through an oversight, Section 73.3598 of the Commission's Rules

However, the many applications for extension of time (FCC Form 701) granted makes this period to build much greater and thus precludes activation of new broadcast service to the public. We are seriously concerned about this situation and intend to strictly review applications for extensions. However, in recognition of the substantial changes in the complexity and amount of the equipment needed and the growing multiplicity of business decisions involved in establishing a station, we are extending the initial period to construct.[2] We will now allow construction periods of 24 months for television stations and 18 months for AM and FM radio and other broadcast and auxiliary stations.[3]

2. By extending the initial length of time allowed permittees to construct their stations, we have provided an adequate time to build broadcast facilities. Thus, there should be fewer applications to extend time. In any event, permittees would be well advised to note our present determination to limit the grant of extension requests. We are providing strict criteria for the granting of applications to extend time to construct broadcast stations.[4] Thus, an application for extension of time to construct such facilities will be granted only under one of the following three circumstances:[5]

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was not amended to reflect an extension of the construction period for Instructional TV Fixed stations to 18 months which was adopted by the Commission in the ITFS *Report and Order* (MM Docket No. 83-523), 49 Fed. Reg. 32590 (August 15, 1984). This oversight is corrected in the instant document.

[2] Under the Federal Radio Commission, the time period within which to construct broadcast stations was four months, whereas in 1934 the FCC provided an eight month construction time period. In 1970, the construction period was again lengthened, that time to its current amount.

[3] A petition for rule making was filed on July 29, 1985, by Mary P. Norman, requesting that International Broadcast stations be allowed a longer initial period within which to construct their facilities. Since this *Memorandum Opinion and Order* extends the time for construction of broadcast stations in general, including International Broadcast facilities, Ms. Norman's petition is dismissed as moot.

[4] We are not applying these new stricter standards for granting applications for extension of time to construct to International Broadcast stations and ITFS. In view of the size and complexity of the equipment for International Broadcast stations and their frequent location in obscure areas, strict criteria for extensions of time will not be imposed on this service. ITFS, in light of the specialized nature and the limited funds available for its growth, also will not be subjected to the new stricter extension of time criteria.

[5] On May 14, 1984, a *Public Notice* (No. 4177) was released establishing similar guidelines for processing applications for additional time within which to construct AM and FM broadcast stations. This *Memorandum Opinion and Order* is intended to supesede the May 14, 1984 *Public Notice* and establish uniform standards for broadcast (not International or ITFS) stations.

a. Construction is complete and testing is underway looking toward prompt filing of a license application.

b. Substantial progress has been made *i.e.*, demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion.

c. No progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.

3. In order to expedite service to the public, we also are establishing strict criteria for the granting of applications for modifications and assignment/transfers of unbuilt facilities,[6] and extensions of time relating to them. If a permittee finds it necessary to file either an application to modify its authorized but unbuilt facilities, or an assignment/transfer application, such application shall be filed within the first 9 months of the issuance of the original construction permit for radio and other broadcast and auxiliary stations, or within 12 months of the issuance of the original construction permit for television facilities. Before such an application can be granted, the permittee or assignee must certify that it will immediately begin building after the modification is granted or the assignment is consummated. Modifications and assignment applications filed after the above time periods will not be granted absent a showing that one of the three criteria in paragraph 2, *supra* applies, and a certification by the permittee or the assignee that it immediately will begin building after the modification is granted or the assignment consummated. The seller must make the "one of three criteria" showing in the assignment/transfer application. Moreover, the burden to meet one of the three criteria increases as the period in the second half of the construction period term continues. If a modification is granted, the time period allowed for construction will be 6 months from the issuance of the authorization to modify or the remainder of the construction period, whichever is longer. Also, in the case of an assignment, the time period allowed for construction will be 12 months from the consummation of the assignment or the remainder of the construction period, whichever is longer.[7] The

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[6] When referring to assignments and transfers, we mean those requiring long form assignments (FCC Form 314) or long form transfers (FCC Form 315).

[7] We do not contemplate allowing repeated assignments which would each permit 12 months from their consummation for the construction of a facility. Allowing such extended time periods would not be in the public interest as it would delay service to the audience.

extension will be given subject to the condition that the modification is completed or the assignment is consummated. Failure to modify or consummate within the time allowed will result in cancellation of the construction permit. We will *not* entertain an application for modification or assignment/transfer if filed after the expiration of the initial construction period.

4. We are amending Section 73.3598 to provide what, under present circumstances, are more realistic time periods for construction.[8] Permittees should nevertheless be advised that we expect station construction to commence and be brought to fruition expeditiously. Moreover, applications for extension of time to construct broadcast stations will be carefully scrutinized. Thus, unwarranted delays will be avoided and service to the public expedited. If stations are not constructed within the allowed time, permittees will lose their authorizations.[9] Others more able to commence operations and provide expeditious service to the public will be given the opportunity to apply for the frequency involved.

5. We believe that providing more time initially for the building of facilities can substantially reduce the volume of requests for extension of time to construct. This will reduce the administrative burdens imposed on Commission personnel, thus allowing scarce staff resources to be better utilized. For this reason and the others expressed in this document, we conclude that the public interest will be served by extending the time periods for construction of broadcast stations and imposing strict criteria for the granting of applications to extend time to construct as well as for granting modifications and assignment/transfers.[10]

6. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease requirements or burdens upon the public. This decrease will be subject to approval by the Office of Management and

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[8] In view of the stricter standards being applied to extension of time requests, we believe the requirement in rule 73.3598 that TV permittees file a report on the progress of station construction is unnecessary. Therefore, that provision is being eliminated.

[9] See *P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984), in which the U.S. Court of Appeals affirmed the Commission's decision cancelling authorizations of those who failed to comply with channel loading and construction requirements within the required time period.

[10] Since the Commission already has the requisite information to take this action and the matter is noncontroversial, prior notice and comment proceedings are neither necessary nor required. 5 U.S.C. § 553(b)(3)(B); and Section 1.412(c) of the Commission's Rules.

Budget as prescribed by the Act.

7. Authority for the action taken herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.[11]

8. Accordingly, IT IS ORDERED, that the Commission's Rules ARE AMENDED, effecive December 10, 1985,[12] as described above and set forth in the attached Appendix.[13]

9. IT IS FURTHER ORDERED, That the Petition for Rule making filed by Mary P. Norman on July 29, 1985, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

* * * * *

2. 47 CFR 73.3534 is revised in its entirety to read as follows:

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[11] The amendments being adopted include a conforming editorial revision which substitutes the word "declared" for "automatically" in rule 73.3599 in order to conform our Rules with our long-standing practice of declaring a construction permit forfeited before considering it actually to have lapsed. For court affirmation of this procedure, *see MG-TV Broadcasting Company v. FCC*, 408 F.2d 1257, 1261 (D.C.Cir. 1968); *Mass Communicators, Inc. v. FCC*, 266 F.2d 681 (D.C. Cir. 1959), *cert. denied.* 361 U.S. 828 (1959); and *United Detroit Theatres Corp. v. FCC*, 178 F.2d 700 (D.C. Cir. 1949).

[12] Since the benefits of these rule changes should be made available to broadcasters and the public immediately, and the matter is noncontroversial, good cause has been found to order this *Memorandum Opinion and Order* effective within less than thirty days from the time it is published in the Federal Register. 5 U.S.C. § 553(d)(3) and Section 1.427(b) of the Commission's Rules.

[13] The new policies for granting modification and assignment/transfer applications and applications for extensions of time will apply, as will the new time periods for initial construction (§ 73.3598), to all construction permits granted after the effective date of this *Order*. As to those permittees holding unexpired construction permits granted prior to the effective date of this *Order*, if they wish additional time to construct they must file an application for extension (Form 701). At that time, such permittees will automatically receive a first extension of six additional months for a total initial construction period of 24 months for TV stations and 18 months for radio, other broadcast and auxiliary stations. We believe this provides current permittees with fair and just treatment. After an initial construction period of 24 or 18 months has been given to current permittees, however, broadcast permittees (not International or ITFS) will be required to meet the new stricter criteria before an extension of time request or an application for modification or assignment is granted.

§ 73.3534 Application for extension of construction permit or for construction permit to replace expired construction permit.

(a) Application for extension of time within which to construct a station shall be filed on FCC Form 701, "Application for Extension of Construction Permit or to Replace Expired Construction Permit." The application shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an application will be accepted upon a showing satisfactory to the FCC of sufficient reasons for filing within less than 30 days prior to the expiration date.

(b) Applications for extension of time to construct broadcast stations, with the exception of International Broadcast and Instructional TV Fixed stations, will be granted only if one of the following three circumstances have occurred: (1) construction is complete and testing is underway looking toward prompt filing of a license application; (2) substantial progress has been made *i.e.*, demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (3) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.

(c) Applications for extension of time to construct International Broadcast and Instructional TV Fixed stations will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the permittee, or upon a specific and detailed showing of other matters sufficient to justify an extension.

(d) If an application for extension of time within which to construct a station is approved, such an extension will be limited to a period of no more than 6 months except when an assignment or transfer has been approved that provides for a longer period up to a maximum of 12 months from the date of consummation.

(e) Application for a construction permit to replace an expired construction permit shall be filed on FCC Form 701. Such applications must be filed within 30 days of the expiration date of the authorization sought to be replaced. If approved, such authorization shall specify a period of not more than 6 months within which construction shall be completed and application for license filed.

3. New 47 CFR 73.3535 Application to modify authorized but unbuilt facilities, or to assign or transfer control of an unbuilt facility, is added to Subpart H, Part 73, to read as follows:

§ 73.3535 Application to modify authorized but unbuilt facilities, or to assign or transfer control of an unbuilt facility.

(a) If a permittee finds it necessary to file either an application to modify its authorized, but unbuilt facilities, or an assignment/transfer application, such application shall be filed within the first 9 months of the issuance of the original construction permit for radio and other broadcast and

auxiliary stations, or within 12 months of the issuance of the original construction permit for television facilities. Before such an application can be granted, the permittee or assignee must certify that it will immediately begin building after the modification is granted or the assignment is consummated.

(b) Modification and assignment applications filed after the time periods stated in paragraph (a) will not be granted absent a showing that one of the following three criteria apply: (1) construction is complete and testing is underway looking toward prompt filing of a license application; (2) substantial progress has been made *i.e.*, demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion; or (3) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. A certification by the permittee or the assignee that it immediately will begin building after the modification is granted or the assignment is consummated is also necessary. A seller must make the "one of three criteria" showing in an assignment application.

(c) If a modification is granted, the time period allowed for construction will be 6 months from the issuance of the authorization to modify or the remainder of the construction period, whichever is longer. Also, in the case of an assignment, the time period allowed for construction will be 12 months from the consummation of the assignment or the remainder of the construction period, whichever is longer. The extension will be given subject to the condition that the modification is completed or the assignment is consummated. Failure to modify or consummate within the time allowed will result in cancellation of the construction permit.

(d) We will not entertain an application for modification of an authorized but unbuilt facility or an application for assignment or transfer of control of an unbuilt facility if filed after the expiration of the initial construction period.

4. 47 CFR 73.3598 is revised in its entirety to read as follows:

§ 73.3598 Period of Construction.

(a) TV broadcast stations. Each original construction permit for the construction of a new TV broadcast station, or to make changes in an existing station, shall specify a period of no more than 24 months from the date of issuance of the original construction permit within which construction shall be completed and application for license filed.

(b) Other broadcast, auxiliary and Instructional TV Fixed Stations. Each original permit for the construction of a new AM, FM or International Broadcast; low power TV; TV translator; FM translator; FM booster; broadcast auxiliary; or Instructional TV Fixed station, or to make changes in such existing stations, shall specify a period of no more than 18 months from the date of issuance of the original construction permit within which construction shall be completed and application for license be filed.

5. 47 CFR 73.3599 is revised in its entirety to read as follows:

§ 73.3599 Forfeiture of construction permit.

A construction permit shall be declared forfeited if the station is not ready for operation within the time specified therein or within such further time as the FCC may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the FCC as of the expiration date.

CATV Designated Television Market

Action adding communities to major television market designations in Section 76.51 of the Rules where Grade B contours of stations licensed to communities to be added are embedded within Grade B contours of stations licensed to communities in existing market designation.
— *Amendment of Section 76.51*
MM Docket 84-111

Copyright

Changes in a television market designation do not subject cable television systems to additional copyright royalty fees for carriage of distant signals where station was not in operation of April 15, 1976.
— *Amendment of Section 76.51*
MM Docket 84-111

FCC 84-573

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 76.51, Major Television Markets. (Orlando-Daytona Beach, Melbourne, and Cocoa, Florida)	MM Docket No. 84-111 RM-4557

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 21, 1984; Released: January 11, 1985

BY THE COMMISSION: COMMISSIONERS QUELLO AND DAWSON CONCURRING IN THE RESULT; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT; COMMISSIONER PATRICK DISSENTING AND ISSUING A STATEMENT.

Introduction

1. The Commission has before it (1) the *Notice of Proposed Rule Making* (49 Fed. Reg. 7414, published February 29, 1984) issued

in response to a petition for rule making filed by Southern Broadcasting Corporation ("Southern") proposing to amend the list of Major Television Markets set forth in Section 76.51 of the Commission's cable television rules by adding Melbourne, Florida to the existing Orlando-Daytona Beach, Florida (#55) designation[1] and (2) the request of Good Life Broadcasting, Inc. ("Good Life") to add Cocoa, Florida to this designation. In response to the *Notice*, Southern submitted comments supporting its Melbourne proposal. American Television and Communications Corporation ("ATC"), Micro-Cable Communications Corp. ("Micro"), and Group W Cable, Inc. ("Group W") submitted opposition comments, to which Southern submitted a consolidated reply. Good Life supported the Melbourne proposal and proposed the addition of Cocoa.[2] Various pleadings were subsequently filed.[3]

Melbourne

2. Southern, licensee of television Station WMOD(TV), Melbourne, argues that, in establishing the major market list, the Commission recognized that certain markets are characterized by more than one population center supporting all stations situated in the market but with different stations licensed to different communities. According to Southern, the major market list, the

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[1] The Commission, by delegated authority, previously adopted a *Memorandum Opinion and Order*, released October 27, 1983, denying Southern's petition for rule making. The *Notice* was subsequently adopted in response to a petition for reconsideration filed by Southern.

[2] Good Life's comments in response to the *Notice* were filed subsequent to the comment deadline. Southern and ATC filed motions to strike Good Life's late-filed comments, in response to which Good Life filed a "Consolidated Opposition to Motions to Strike." Southern replied to the "Consolidated Opposition." Good Life submitted a "Motion to Consolidate" and "Petition for Rule Making," to which Southern and Group W submitted opposition comments. Since it appeared that the determination of whether to grant Good Life's proposal to add Cocoa involved similar issues to that of Southern's proposal to add Melbourne to the existing hyphenated market designation, the Commission issued an *Order* (49 Fed. Reg. 25254, published June 20, 1984) extending the time for filing comments and reply comments and inviting comments on Good Life's proposal.

[3] Good Life submitted a petition to file late comments supporting its Cocoa proposal. Micro requested leave to file late supplemental comments "in order to propose a solution to the (copyright) dilemma" should the Commission amend the existing market designation. Southern moved to strike Micro's late-filed comments, urging that Micro's copyright proposal is more appropriately dealt with in another proceeding. Micro submitted a pleading alternately opposing and replying to Southern's motion to strike. In light of the Commission's determination of the substantive issues raised in this proceeding, as set forth below, it is not necessary to consider the matters raised in the pleadings. Thus, we have not accepted these late filed pleadings.

mandatory carriage provisions of the cable television rules, and the Commission's policy regarding hyphenated market designations are intended to enable all stations in a market to compete by providing them and their audiences with access to each other. Southern asserts that Orlando, Daytona Beach, and Melbourne constitute a single market. In this regard, Southern notes that all Orlando and Daytona Beach stations place a Grade B signal over Melbourne and rely on that community for economic support and that WMOD(TV) derives "significant" revenue from communities other than Mebourne. Southern also notes that none of the major television networks have more than one affiliate in the market, that Arbitron has designated these three communities as one market, and that program distributors treat Melbourne as part of the Orlando-Daytona Beach market and charge accordingly. Further, Southern notes that the public, through its Congressmen, recognize these three communities as "an integrally connected social, political, and economic unit." Southern states that, despite covering all of Orlando and Melbourne with a Grade A signal and the bulk of the tri-city market with a Grade B signal, it is, nevertheless, precluded from effective competition with the Orlando and Daytona Beach stations which are entitled to mandatory signal carrage on entitled to mandatory signal carrage on Orlando and Daytona Beach cable television systems, whereas, in contrast, WMOD(TV) cannot demand such carriage and, accordingly, cannot charge advertising rates comparable to its competition. According to Southern, this is the unequal competitive situation which concerned the Commission when it adopted its hyphenated market policy. Southern also points out that there was no television station licensed to Melbourne in 1972 when the Commission initially established the major market list and that, therefore, Melbourne could not have been considered for inclusion in the Orlando-Daytona Beach designation.

3. ATC, operator of three cable systems in the Orlando-Daytona Beach market, argues that Southern's proposal must be considered in light of the functions of the mandatory carriage provisions, citing *Television Muscle Shoals*, 48 R.R. 2d 1191 (1980), *recon. denied*,, 87 F.C.C. 2d 507 (1981). According to ATC, those provisions were adopted to ensure that "local" stations were not denied access to their natural over-the-air audiences, citing *Television Muscle Shoals*. ATC claims that there are many viewers situated within the Daytona Beach and Orlando 35-mile zones who do not come within WMOD(TV)'s natural over-the-air audience, and therefore, adoption of Southern's proposal would

compel cable systems operating well outside WMOD(TV)'s Grade B contour to add a signal which would otherwise not reach their subscribers. Similarly, ATC refers to a second UHF TV station (WSCT, Channel 56) at Melbourne which would likewise acquire mandatory carriage status although its service area is even more limited in relation to Orlando and Daytona Beach. In this context, ATC questions, without elaboration, the constitutionality of the mandatory carriage provisions insofar as they interfere with a cable operator's editorial discretion concerning signal carriage and deprive a system of use of channels.[4]

4. In addition, ATC argues that there has been no showing that Southern's proposal is in the public interest. According to ATC, it is fallacious to first assume that Melbourne is a part of the Orlando-Daytona Beach market and then assert that the public interest would be served by ensuring access between cable subscribers and WMOD(TV). ATC refers to Arbitron off-air ratings and asserts that, in fact, they evidence a lack of interest in WMOD(TV)'s programming in the Orlando and Daytona Beach areas. According to ATC, in *Television Muscle Shoals* the Commission considered and rejected arguments concerning program costs and inability to charge competitive advertising rates.

5. ATC argues that, as a result of limited existing channel capacity, adoption of Southern's proposal would mean that cable systems would have to drop existing program services. According to ATC, this would impose a substantial burden on cable operators and subscribers, especially in light of the remoteness of Melbourne stations from Orlando and Daytona Beach audiences and the lack of existing presence of those stations in the affected cable communities. Finally, ATC asserts that only once has the Commission added a community to an existing hyphenated market designation, citing *Newark, New Jersey*, 47 F.C.C. 2d 752 (1974), and then as a result of a compelling showing on the part of the petitioner. In contrast, ATC asserts that, absent compelling circumstances, the Commission has consistently refused to add to existing designations. In this context, ATC argues that the Arbitron designation including Melbourne is irrelevant, as the Commission has clearly indicated that, although its original major market list was derived largely from Arbitron's 1970 rankings, changes in those rankings would not justify changes in the major

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[4] See *Cable Systems Inc.*, 71 F.C.C. 2d 436 (1979), wherein the Commission noted that it previously rejected a contention that its cable television rules were in violation of the First Amendment, citing court decisions in accord. See also *Dublin Associates, Ltd.*, 45 R.R. 2d 1643 (1979).

market list.

6. Micro's opposition is predicated on alleged copyright ramifications. According to Micro, operator of a Vero Beach, Florida cable system, under the Copyright Law of 1976, adoption of Southern's proposal would subject it to mandatory carriage of Orlando and Daytona Beach stations and potentially require it to pay over $100,000 annually in additional copyright royalty fees. This is so, says Micro, because the Copyright Law defines a local station as one entitled to mandatory carriage under the Commission's Rules in effect in 1976. According to Micro, inclusion of Melbourne in the existing Orlando-Daytona Beach designation will mean that, although the Orlando and Daytona Beach stations will remain distant in relation to Vero Beach for copyright purposes, it will, nevertheless, have to pay those stations additional royalty fees. Micro questions whether Southern needs cable carriage in Orlando and Daytona Beach, pointing out Southern's acknowledgment that rating services include WMOD(TV) in the Orlando-Daytona Beach market and that it presently receives advertising revenue on this basis. Micro claims that many cable systems, such as its own, are located at extremities of the proposed market designation and cannot receive signals of all stations and that this necessitates additional expenditures for microwave facilities. Accordingly, Micro also questions the accuracy of the Regulatory Flexibility Act Initial Analysis set forth in the *Notice*, claiming that, in fact, there will be "substantial" compliance costs to affected parties.

7. Micro suggests that, absent a denial of Southern's proposal, the Commission grant a waiver of its Rules so as to otherwise provide Orlando, Daytona Beach, and Melbourne stations with mandatory carriage rights within their mutual 35-mile zones without creating adverse copyright consequences. Finally, Micro states that it endorses Group W's suggestion (para. 8 *infra.*) that the Commission consult with the Copyright Office and amend Section 76.51 only if the Copyright Office agrees not to collect royalty fees for "must carry" stations.

8. Group W describes itself as an operator of "several" cable systems in the Orlando-Daytona Beach market and states that, in the interest of stability, the major market list is not subject to change based on Arbitron ratings and that, to promote stability, the Commission has evaluated proposals to amend the list in light of three criteria which are not present here. First, Group W states that Daytona Beach is over 75 miles from Melbourne and is far outside the Grade B contours of Melbourne facilities. Thus,

WMOD(TV) is not being denied access to its natural over-the-air market. In this regard, Group W cites *Television Muscle Shoals*, where the Commission refused a similar request in part because it would have required carriage of a station's signal beyond its Grade B contour and over an inordinate distance. Second, Group W claims that it will incur significant costs if it must carry Melbourne signals, whereas there will be no corresponding proportionate public benefit. In this regard, Group W claims that the Commission has previously rejected similar "unsupported" conclusions that a proposed community is part of an existing market and that the public interest benefits from promotion of intramarket competition, citing *Triangle Publications, Inc.*, 47 F.C.C. 2d 633, 634 (1974) and *Northeast Minnesota Cable TV, Inc.*, 49 F.C.C. 2d 983 (1974). Further, citing *Television Muscle Shoals,* Group W asserts that the Commission has previously rejected hyphenation in the face of significant costs and absent evidence of public benefits. Citing *Coldwater Cablevision, Inc.*, 66 F.C.C. 2d 235 (1977), Group W indicates that a waiver of the mandatory carriage provisions was appropriate where the costs of receiving off-air signals were prohibitive. Third, Group W argues that there is no public need to adopt Southern's proposal. According to Group W, WMOD(TV)'s inability to charge major market advertising rates while paying major market programming costs is shared by all similarly situated UHF stations and is a problem which the Commission need not underwrite and which was rejected in *Television Muscle Shoals.* Group W asserts that avenues other than mandatory carriage are open to Southern to increase its audience. Group W contests Southern's claim that its programming is responsive to public needs and concerns in the three cities involved here, referring to Arbitron data. In this regard, Group W claims that existing programming from other sources is responsive to issues of public concern in the Orlando-Daytona Beach market and that any benefit from importing programming from Melbourne is outweighed by the disruption to existing sources. Finally, Group W agrees with Micro's comments on the adverse copyright consequences.

9. In its consolidated reply, Southern argues that ATC and Group W erroneously contend that the proposed amendment would be inconsistent with the mandatory carriage provisions. Citing *Television Muscle Shoals, supra*, Southern asserts that, for purposes of those provisions, "market" is the area to which stations look for economic support, and neither commenter disputes the "finding" set forth in the *Notice* that WMOD(TV)

derives significant revenue from other communities, including Orlando. Southern argues that since the Commission contemplated that portions of hyphenated markets may lie outside the Grade B contours of some stations, ATC and Group W are wrong in asserting that allowing WMOD(TV) to require carriage beyond its Grade B contour would be violative of the Commission's mandatory carriage policy. While agreeing that the Rules should not be changed to reflect changes in Arbitron's rankings, Southern claims that its proposal conforms to the Commission's definition and policies regarding hyphenated markets and is not merely based upon those rankings. In this regard, Southern argues that cases cited as precedent for Commission refusal to amend hyphenated markets are factually distinguishable from this proceeding. Southern States that ATC and Group W ignore the fact that, unlike the *Television Muscle Shoals* situation, WMOD(TV) places a Grade A signal over all of Orlando and a Grade B signal over most of the tri-city area and that hyphenation is proper where portions of a market are occasionally beyond the Grade B contours of some market stations, citing *Cable Television Report and Order*, 36 F.C.C. 2d 143 (1972). Southern contends that, although the hyphenation request in *Television Muscle Shoals* was denied, in part, because cable systems would be required to carry duplicative network programming, WMOD(TV) offers independent programming responsive to public needs and concerns. Finally, Southern argues that ATC, Micro, and Group W fail to address the issue of whether Melbourne should be included within the existing hyphenated market designation. Rather, Southern contends that these opponents raise confusing issues of significantly viewed signals, waiver, and copyright which are more appropriately dealt with in other proceedings and contexts.

Cocoa

10. Good Life, licensee of Station WTGL-TV, Cocoa, asserts that all Orlando, Daytona Beach, and Melbourne television stations cover Cocoa with a Grade B signal and that WTGL-TV places a city grade signal over most of Orlando and all of Melbourne as well as a Grade A signal over a "substantial portion" of the Orlando-Daytona Beach market, that WTGL-TV competes with the other television stations in the Orlando-Daytona Beach-Melbourne area, and that bringing WTGL-TV's independent voice to this market is in the public interest.

According to Good Life, in light of the "substantial similarities" between the market locations of its station and WMOD(TV) as well as their competitive postures, the public interest also requires that they be placed on an equal footing consistent with the objective of the hyphenated market rule as set forth in *Cable Television Report and Order, supra.*

11. ATC states that it opposes the Cocoa proposal for the same reasons it opposes the Melbourne proposal. Southern contends that Good Life has failed to demonstrate a public interest reason to add Cocoa or to provide evidence of a public desire in the Orlando-Daytona Beach area to receive WTGL-TV's signal. Group W asserts that Good Life's proposal shows that a grant of the Melbourne proposal would lead to similar requests by other UHF stations. Group W maintains that Good Life does no more than make a showing that its Grade B contour extends partly into the Orlando market, where WTGL-TV is not viewed significantly and lacks audience interest. Good Life points out that the Commission's cable rules require carriage as far as a commercial station's Grade B contour only where such a signal extends from one smaller market to another or into areas beyond all markets. Finally, Group W maintains that reliance on Grade B contours alone in determining the extent of hyphenated market designations could change the mandatory carriage landscape and lead to disasterous copyright consequences.

12. Micro suggests that to solve the "dilemma" it would face if Section 76.51 were amended, the Commission should simultaneously grant a waiver of Section 76.54 of its rules for all cable systems located within 35 miles of any designated community in the hyphenated market by which all present and future television stations licensed to any such designated communities would be deemed significantly viewed. According to Micro, since such action would be a waiver of Section 76.51 as of its effective date of April 15, 1976, it would require cable systems to carry all stations in the market as "local" for both Commission and copyright purposes. Micro emphasizes, however, that this suggestion is put forth only in case Section 76.51 is amended, an action which would mandate an examination of the overall consequences as well as appropriate relief under the Regulatory Flexibility Act, which requires consideration of the impact of new regulations on affected parties as well as minimization of adverse consequences.

13. Southern claims that it was not served with a copy of Micro's supplemental comments and that they contain no showing of good cause for acceptance. Alternatively, Southern asserts that

the instant proceeding is not the appropriate forum to address the copyright issue. According to Southern, because the hyphenated market rules were in effect on April 15, 1976, amendment of those rules here would mean that WMOD(TV)'s signal would be treated as local for Commission purposes. This, states Southern, would require that this signal be treated as local for copyright purposes, just as signals deemed significantly viewed after April 15, 1976 have been treated as local for both FCC and copyright purposes. Only if the Copyright Office rejected such reasoning would Southern have the Commission revisit the copyright question. Good Life submits that Micro's proposal should be addressed in a separate rule making proceeding, because that would allow both a more expeditious consideration of the Section 76.51 issue as well as a proper analysis of Micro's waiver proposal.

Discussion

14. The initial issue to be determined is whether the communities of Orlando, Daytona Beach, and Melbourne do, in fact, constitute a single television market. It has been established that the four TV stations currently licensed to Orlando (WFTV, WOFL, WMFE-TV, and WCPX-TV) as well as the station currently licensed to Daytona Beach (WESH-TV) compete within the same television market. An examination of the comments reveals that their Grade B contours all encompass the principal communities of Orlando, Daytona Beach, and Melbourne and, to a significant extent, otherwise encompass the same geographic area. We believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support. Thus, we believe that the communities do, in fact, comprise a single television market for economic purposes. However, this determination is not totally dispositive for purposes of the Commission's market designations and the question of whether or not hyphenation is appropriate.

15. For purposes of the mandatory carriage provisions, the term market was intended to refer to the areas on which stations in a market actually rely or logically can rely for economic support. See *Television Muscle Shoals, supra,* at 1193. An examination of the comments also reveals that the geographic area within WMOD(TV)'s Grade B contour falls almost entirely within these other contours. Further, the area encompassed by WMOD(TV)'s Grade B contour constitutes a significant portion of the existing hyphenated market designation, centered on and

including the largest community, Orlando (population 128,394).[5] Since the area relied on by WMOD(TV) for economic support is embedded within the area relied on by the Orlando and Daytona Beach stations, for purposes of mandatory carriage, all of these stations are competitors in the same market.

16. That Arbitron now designates an "Orlando-Daytona Beach-Melbourne" television market is an additional indication of mutual economic reliance on the same market by stations licensed to all three component communities. Standing alone, Arbitron's designation is not sufficient to persuade the Commission to amend the major television market list as requested by Southern. The Commission initially established that list largely based on Arbitron's 1970 prime-time household ranking and indicated that, to provide stability, it would not revise its list each time Arbitron revised its rankings. *Cable Television Report and Order, supra,* at 171–172. Nevertheless, the Commission has not foreclosed the need to amend the major market list in light of changed circumstances, which evidence good reason to do so. In light of the above, it appears that WMOD(TV) and the Orlando and Daytona Beach stations all compete with each other in the same television market.

17. The Commission is cognizant of the fact that WMOD(TV)'S Grade B contour does not extend to Daytona Beach and that, therefore, its economic reliance does not extend to that portion of the market. However, the signal carriage rules were adopted in 1972, in part, "to assure that 'local' stations are carried on cable television systems and are not denied access to the audience they are licensed to serve ...." *Cable Television Report and Order, supra,* at 173. Recognizing that there was no clear division between "local" and "distant" signals, the Commission, nevertheless, determined that a line had to be drawn. Accordingly, it concluded that certain classes of signals should be treated as local, including signals of stations licensed to communities in hyphenated markets. *Id.* Hyphenated markets were characterized as having "more than one major population center supporting all stations in the market but with competing stations licensed to different cities within the market ...." *Id.* at 176. In light of the structure of such markets, "including terrain and population distribution," the Commission recognized that "portions ... are occasionally located beyond the Grade B contours of some market stations," and, accordingly, adopted the hyphenated market

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[5] Population figures are from the 1980 U.S. Census.

provision into the mandatory carriage rules "to help equalize competition" between stations in hyphenated markets and "to assure that stations will have access to cable subscribers in the market and that cable subscribers will have access to *all* stations in the market." (emphasis added) *Ibid.* In light of the above, it appears that the communities of Orlando, Daytona Beach, and Melbourne do, in fact, constitute a single television market. In this regard, our determination that these communities constitute a single television market should not be viewed as marking a change in Commission policy, and we believe that, faced with the facts before us here, the Commission would have designated an Orlando-Daytona Beach-Melbourne hyphenated market when it initially established the major market list.

18. As set forth above, comments both supporting and opposing Southern's request contain reference to the *Television Muscle Shoals* case in which the Commission denied a request to amend the major market list by adding Florence, Alabama to the existing Huntsville-Decatur, Alabama hyphenated market designation. A comparison of the facts in that case with those here reveals significant differences. In *Television Muscle Shoals*, the Grade B contour of the television station licensed to Florence did not reach either Huntsville or Decatur. Likewise the Grade B signals of the Huntsville stations[6] did not reach Florence. Thus, the Florence and Huntsville stations, unlike the Melbourne, Orlando, and Daytona Beach stations, did not share a mutual economic reliance on the same market. Whereas the Florence station had very little off-air audience in any part of the 35-mile zones[7] around Huntsville and Decatur in which mandatory cable carriage was sought, the same cannot be said of WMOD(TV), which not only places a Grade B contour over and beyond Orlando, the major population center of the market, but which further places a Grade A signal over that community as well a

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[6] No television stations were then operating from Decatur.

[7] Generally the specified zone (35 miles) around the city of license is the standard for determining the "market" for mandatory carriage purposes. See Sections 76.61 (a) (1) and 76.5 (f) of the Commission's Rules. That policy was intended, in part, to aid stations whose Grade B contours may not cover a radius of 35 miles. *Cable Television Report and Order, supra* at paragraph 82. However, the Commission recognized in that proceeding that the specified zone does not in all cases reflect the character of a market. Rather, some markets are reflected by a hyphenation because stations licensed to more than one community compete for audiences within a certain area. *Id.* at paragraph 87. In such cases, a station's transmitter is often located closer to a population center outside the specified zone of that station's community of license. The hyphenation technique would be a more accurate characterization of the market area in those cases than would the specified zone.

Grade B signal over a portion of the 35-mile zone around Daytona Beach. In the earlier *Television Muscle Shoals* case, the Commission determined that, in the context of the cable television rules, the lack of cable carriage did not impede the Florence station from reaching its natural over-the-air audience, 48 R.R. 2d at 1194. In contrast, Southern seeks mandatory carriage privileges in areas in which most of its natural over-the-air audience is located.

19. A determination that Melbourne, Orlando, and Daytona Beach comprise a single television market and, accordingly, that the major market list should reflect this, is consistent with the Commission's decision in *Television Muscle Shoals.* In that case, the Commission emphasized four factors applicable to a request to add a community to an existing television market designation: (1) the distance between the proposed community and existing designated communities; (2) whether most of the area where a station licensed to the proposed community would be afforded expanded carriage rights lies beyond its Grade B contours; (3) the presence of a clear showing of particularized need by a station requesting a change of designation; and (4) an indication of benefit to the public from the proposed change. The Commission's denial of the request to add Florence to the existing market designation turned on these four factors. First, there was a significant distance, approximately 75 miles, separating the Florence and Huntsville stations. Second, most of the area in which the Florence station sought expanded carriage rights lay outside its Grade B contour. Third, there was no clear showing of particularized need by the Florence station for such expanded rights. Finally, there would be no public benefit from a grant of the requested change. 48 R.R. at 1194. Here, the distance between WMOD(TV) and its competitors licensed to Orlando and Daytona Beach is appreciably less than in *Television Muscle Shoals.* Significantly, unlike the market situation faced by the Florence station, the geographic area in which WMOD(TV)'s off-air audience is situated is nearly entirely embedded within the areas encompassed by the Grade B contours of the Orlando and Daytona Beach stations. Although WMOD(TV) will gain expanded carriage rights outside its Grade B contour area, it will, nevertheless, largely gain such rights in a significant area within that contour, meeting our test as set out in *Television Muscle Shoals.* Southern's particularized need for expanded carriage rights is demonstarted by its showing that, unlike other stations in its market, it faces a competitive disadvantage, because it is

not entitled to demand cable carriage in certain portions of that market. Finally, unlike *Television Muscle Shoals,* additional hyphenation here would not merely provide duplicative network programming or programming which would not serve the needs of Orlando-Daytona Beach audiences. As noted, WMOD(TV) is an independent station, and Southern contends that it has and will program in the interest of viewers in the Orlando and Daytona Beach areas of the market, thereby providing a public benefit.

20. A consequence of amending the major television market list by expanding the existing Orlando-Daytona Beach designation is that a cable television system serving a community situated within 35 miles of any designated community could be required, under the mandatory carriage provision of Section 76.61(a)(4) of the cable television rules, to carry the signal of any station licensed to any designated market community. This is so even though such a signal might not otherwise be available "off-air" in the community served by the system. In the instant situation, a grant of Southern's request would afford WMOD(TV) mandatory carriage rights in communities located as far as 35 miles north of Daytona Beach and clearly beyond that station's over-the-air signal. Similarly, a system serving a community located south of Melbourne might have to carry WESH-TV's signal, even though the audience in that portion of the market could not otherwise receive it. Although, to some extent, this consequence results in certain stations being able to compete for audiences they could not otherwise reach, the mandatory carriage provisions reflect the Commission's policy determination that competition among all market stations be equalized by providing all stations and all cable subscribers access to each other. In making that determination, the Commission was aware that it was aiding stations whose Grade B contours were limited by extending their coverage to areas deemed necessary to their develcpment. See *Cable Television Report and Order, supra,* at 174.

21. As noted by ATC, the Commission has previously granted only one request to amend the major television market list. In that situation, the licensee of a television station licensed to Newark, New Jersey sought inclusion of its community of license in the existing New York, New York-Paterson-Linden, New Jersey hyphenated market designation, pointing out that the 35-mile zones of those designated communities encompassed Newark's 35-mile zone, resulting in a anamolous situation whereby a smaller television market was wholly contained within a major market. Faced with those facts, the Commission concluded that all four

cities constituted a single market within which television stations licensed therein must compete and that, therefore, each city should be designated to the same television market. *Newark, New Jersey, supra*, at 753. The factual circumstances in the Newark and Melbourne situations are sufficiently similar so that a similar determination is appropriate. As noted, WMOD(TV)'s Grade B contour is almost entirely enclosed within the areas on which the Orlando and Daytona Beach stations rely for economic support. Such a situation is distinguishable from others where stations are licensed to separate but geographically proximate markets and look to market areas which merely overlap.

22. The factual situations concerning Cocoa are sufficiently similar to those concerning Melbourne to warrant inclusion of the former in the existing major market designation. Specifically, the Grade B contours of the Orlando and Daytona Beach stations totally encompass Cocoa, which is geographically nearer the center of the Orlando-Daytona Beach market than is Melbourne, and WTGL-TV's Grade B contour is nearly identical to WMOD(TV)'s. Further, it is not alleged that WTGL-TV's programming will be duplicative of that already available in the market. Accordingly, our determination regarding Good Life's request is based upon the same policy considerations set forth above regarding Southern's request.

23. The concerns of ATC, Micro and Group W are concentrated on the consequences of an amended hyphenated market designation in conjunction with the mandatory carriage provision of Section 76.61. While these concerns are relevant, we can not be guided by matters outside the focus of the issue to be determined here. As indicated above, the findings that Melbourne and Cocoa are part of a single Orlando-Daytona Beach-Melbourne-Cocoa market are based on factors of service, coverage, economics of operation, and other market indicators rather than the impact of these findings on certain cable systems. To the extent this amendment to the existing market designation results in hardships to cable systems, it is appropriate to evaluate such results for relief by seeking a waiver of the mandatory carriage rule. See Section 76.7 of the Commission's Cable Television Rules. Consequently, the suggestions put forth by Micro and by Group W concerning alternate Commission action in this regard will not be considered here.

24. The Commission's determination that it is appropriate to amend the major television market list in response to the requests in this proceeding is based on the reasons set forth above. Nevertheless, the Commission appreciates the copyright concerns expressed by Micro and by Group W. As noted by the cable opponents, the Copyright Act obligates operators of cable television systems to pay royalty fees for the carriage of distant, as opposed to local, television stations. For copyright purposes, local signals are defined in Section 111(f) of the Copyright Act as those which were subject to mandatory carriage pursuant to the Commissions Rules in effect on April 15, 1976. As of that date, Section 76.61 provided carriage rights to local stations, and for mandatory carriage purposes, stations licensed to designated communities in major hyphenated television markets were considered local. As set forth above, Commission action in the instant proceeding consitutes a recognition that the Melbourne and Cocoa stations compete with the Orlando and Daytona Beach stations and that, accordingly, their communities of license are part of the same market whose designation should reflect that fact. As a consequence, the Melbourne and Cocoa stations are considered local for purposes of mandatory carriage and, thus, should also be considered local for purposes of the Copyright Act.[8] Section 76.61 is unaffected by Commission action here. Although additional stations will henceforth be able to insist on mandatory signal carriage, that is a consequence of the market situation, not of a change in the Commission's Rules in effect on April 15, 1976. This situation is similar to that where, under Section 76.54, a television signal is determined to be significantly viewed and thereby falls under the mandatory carriage provisions.[9] A signal determined to be significantly viewed subsequent to April 15, 1976 is considered as local for both mandatory carriage and copyright purposes.

25. Sections 76.51 and 76.61 of the Commisison's cable television rules were, as noted, in effect prior to April 15, 1976. Action taken by the Commission in this proceeding does not alter either provision. The major television market list will continue to encompass the same top 100 markets. No markets are hereby added and none deleted. The Orlando-Daytona Beach market is

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[8] Our interpretation of the Copyright Act is not a mandatory opinion which binds the Copyright Royalty Tribunal. Should the Tribunal find to the contrary, the Commission could revisit this matter in a future proceeding.

[9] See Sections 76.57(a)(4), 76.59(a)(6), and 76.61(a)(5) of the Commission's Rules.

being redesignated Orlando-Daytona Beach-Melbourne-Cocoa to reflect changes in that market since 1972. Although additional stations, such as WMOD-TV and WTGL-TV, will thereby acquire mandatory carriage rights, they will do so pursuant to Section 76.61 of the Rules which was, as noted, in effect on April 15, 1976.

26. The Commission recognizes that the Copyright Royalty Tribunal which was established to administer the copyright system, and, which has jurisdiction over copyright matters, is not bound by the Commission's determination of copyright issues. Nevertheless, the Commission finding that the market designation should reflect the addition of local signals is based on matters within its area of expertise and with due regard to the copyright consequences of such action.

27. As for Micro's argument that the Regulatory Flexibility Act Initial Analysis was inaccurate since some small businesses will incur expenses such as those related to operation of microwave equipment necessary to receive the signals of stations licensed to Melbourne and/or Cocoa, the Commission has previously determined in a similar context, that is, amendments to its FM and Television Tables of Assignments,[10] that the provisions of Sections 603 and 604 of the Regulatory Flexibility Act[11] do not apply. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981. The Commission certifies here that, as provided by Section 605 of the Regulatory Flexibility Act, because there are few entities directly affected in the matter of amendment of Section 76.51 of its Rules and these parties have had the opportunity to comment on the proposals here, the provisions of the Act do not require additional analysis beyond what has been specifically addressed in relation to the directliy affected parties.

28. Authority for the actions taken herein is contained in Sections 4(i) and 303(g) and (r) of the Communications Act of 1934, as amended.

29. Accordingly, IT IS ORDERED, That effective February 19, 198 , the list of Major Television Markets (Section 76.51 of the Commission's Rules) IS AMENDED as follows:

(55) Orlando-Daytona Beach-Melbourne-Cocoa, Florida

30. IT IS FURTHER ORDERED, That this proceeding is

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[10] Sections 73.202(b), 73.504, and 73.606(b).

[11] Public Law 96-354, September 19, 1980, 94 STAT 1164; U.S.C. 601 *et seq.*

TERMINATED.

31. For further information concerning this proceeding, contact Joel Rosenberg, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

November 21, 1984

SEPARATE STATMENT OF COMMISSIONER HENRY M. RIVERA

RE: Report and Order Amending the List of Major Television Markets by Adding Melbourne and Cocoa, Florida to the Existing Orlando-Daytona Beach, Florida Designation

For the first time in ten years, we have amended the list of major television markets (Section 76.51 of the Rules) to add new cities to an existing market. While I agree that they must carry rules require the result reached here, it continues to perplex me that the Commission refuses to undertake the long overdue, comprehensive review of the policies underlying these rules. Application of the must carry rules in this circumstance will cause each of the affected cable systems to bear the expense and dislocation of carrying several new must carry stations. In addition, this decision may induce hundreds of similarly situated licensees to ask the Commission to add their communities of license to nearby major television markets. If such requests are honored, a significant resource impact on both the cable industry and this agency will result.

As I have said before,[1] the time has long passed for plenary review of the entire must carry issue. Failure to vote for this item would have sanctioned another piecemeal revision of the must carry rules. I have refused in the past, and will continue to refuse to be party to this type of selective repeal of these must carry rules. I can only hope that any turmoil caused by this decision will awaken this Commission to the fact that there is a better way to make policy.

DISSENTING STATEMENT OF COMMISSIONER DENNIS R. PATRICK

In the Matter of Amendment of Section 76.51, Major Television Markets List, to add Melbourne and Cocoa

Florida, to Orlando-Daytona Beach, Florida designation (MM Docket No. 84–111)

I dissent from the Commission's decision to amend the list of 100 major television markets, as set forth in Section 76.51 of the Commission's rules, by adding the cities of Melbourne and Cocoa to the existing Orlando-Daytona Beach, Florida, hyphenated major TV market designation. I find the Commission's decision wrong both as a matter of law and as a matter of policy.

With respect to the legal underpinnings of the *Report & Order* ("*R&O*"), the majority asserts that it is not departing from precedent. I disagree. In order to redesignate the Orlando-Daytona Beach market as the Orlando-Daytona Beach-Melbourne-Cocoa market, the majority departs from past precedent not once, but several times. First, the majority departs from the Commission's explicit statement in the 1972 *Cable Report & Order*, 36 F.C.C. 2d 143 ("*Cable R&O*"), that the top 100 markets will be redesignated only "where anomalous results would otherwise occur." *Id.* at 172, n.37. Second, the majority fails to require *mutual* economic reliance in determining if these markets comprise a single TV market. Third, the majority ignores the 35-mile specified zone and instead relies solely on Grade B contours to justify its decision to hyphenate these markets. Fourth, the majority incorrectly applies past cases decided by the Commission. Finally, the majority brushes off the copyright issue as inconsequential, when in fact it could prove to be a troubling and costly problem.

In addition to these legal deficiencies, the *R&O* suffers from several policy and regulatory problems. The *R&O* sets a precedent that could result in an avalanche of similar requests. That precedent is, moreover, a bad one. It fails to consider the effects on small cable operators and is unsupportable by public interest concerns. Finally the Commission's failure to include a regulatory flexibility analysis is troubling.

I will briefly amplify on each of these problems.

1. Hyphenation is not necessary to avoid an "anomalous result".

The very act of redefining one of the 100 major TV markets, under the circumstances of this case, represents a change in policy. The Commission established the list of the 100 major TV markets in 1972, as part of the *Cable R&O*. In establishing the list, found at Section 76.51 of our rules, the Commission relied primarily on Arbitron's 1970 prime-time households ranking. In order to provide stability in this area, the Commission explicitly stated that "the list will not be revised each time new rankings are issued." *Id.* at 172. Only where "anomalous results would otherwise occur" would major market designations be revised. *Id.* at 172, n.37.

As explained more fully below, a refusal to amend the major market list in this instance would lead not to an anomalous result, but to a just and appropriate result. It defies logic to conclude that requiring a cable system in Daytona Beach, more than 75 miles away from Melbourne and receiving no off-air Melbourne reception, to carry Melbourne broadcast signals is necessary to avoid an anomalous result. Indeed, it *creates* such a result.

2. *The majority's market analysis is flawed in that it fails to require mutual economic reliance.*

A hyphenated market is characterized by overlapping communities with mutual economic dependence. By definition, a hyphenated market is one in which various population centers support *all* stations in the market. *Cable R&O* at 176.

Even the majority admits that "mutual economic reliance on the same market" is relevant to the inquiry. *R&O* at 8. But then the majority fails to require mutuality. If Melbourne, Orlando and Daytona Beach were in fact a single market, then Daytona Beach would be economically reliant on Melbourne and vice versa. Melbourne residents would watch Daytona Beach stations and Daytona Beach residents would watch Melbourne stations.

This mutuality simply does not exist. The economic reliance is solely one directional: Melbourne residents take an interest in Daytona Beach programs, but Melbourne's station WMOD-TV *does not even reach* the Daytona Beach area. Even the majority recognizes "that WMOD-TV's Grade B contour does not extend to Daytona Beach and that, therefore *its economic reliance does not extend to that portion of the market.*" *R&O* at 8 [emphasis added].

This conclusion is not altered by the majority's characterization of Daytona Beach as a mere "portion" of the market. It is true that the Commission is 1972 recognized that communities may be hyphenable even if "portions of a market are occasionally located beyond the Grade B contours of some market stations." *Cable R&O* at 176. Here, however, the purported "portion" is an entire community, *viz.*, Daytona Beach. If only a *portion* of Daytona Beach were located beyond WMOD-TV's Grade B contour, hyphenation might still be justified. Where, however, *all* of Daytona Beach lies beyond the Melbourne stations Grade B contour, the "occasional portions" exception cannot apply if it is to have any logical meaning.

3. The majority totally ignores the 35-mile specified zone in defining the market.

In addition to failing to find mutual economic reliance, the majority's market analysis is flawed by ignoring the 35-mile specified zone and focusing solely on Grade B contour overlap. As the Commission has previously noted, the term "market" is not without its ambiguities and is defined differently in different contexts.[1]

The *Cable R&O* and our rules clarify that the "specified zone" of a 35-mile radius around a point in a TV station's community is key in determining which cable systems are required to carry the TV station. *Cable R&O* at 172, 174; 47 C.F.R. Sections 76.59, 76.61, 76.5(f). Any cable system licensed to a community within the 35-mile zone is required to carry the TV station. Although cable systems falling outside the 35-mile zone, but within a station's Grade B contour, must also carry the station under certain circumstances, the Commission has indicated that it had purposely chosen the 35-mile zone as the indicator of the TV market rather than the Grade B contour, stating:

> This requirement, based on rules, is intended to aid stations—generally UHF—whose Grade B contours are limited.[2]

If the 35-mile zone were applied here as an indicator of market boundaries, it can easily be seen that Melbourne and Daytona Beach are separate markets for purposes of whether Melbourne TV should be carried on Daytona Beach cable: The 35-mile zone of Daytona Beach never intersects with the Melbourne station's Grade B contour. In light of this fact, I find the majority's failure to even mention this zone–or the fact that its reliance on Grade B contour alone represents a departure from the Commission's precedents and rules–troubling.

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[1] *TV Muscle Shoals*, 48 R.R. 2d 1191, 1193 (1980), *recon. denied*, 87 F.C.C. 2d 507 (1981).

[2] *Id.* at 174. Furthermore, the 35-mile zone was selected as opposed to one with a larger or smaller mileage because even though UHF stations generally have significantly smaller service areas than VHF stations, the substantial share of a UHF station's audience (no matter where the station is located) is within the 35-mile zone. *Id.* at 172, n.38.

4. The majority misapplies past case law.

The Commission has decided only two cases arising from major market hyphenation redesignation requests. One was denied and the other granted. The majority finds the facts of the instant case more similar to those in the case where the Commission granted the request. I disagree.

In *Newark, New Jersey*, 47 F.C.C. 2d 752 (1974), the Commission agreed to redesignate the New York, New York-Linden-Paterson, New Jersey market to include Newark, New Jersey in the hyphenated market. Newark was found undeniably to be a core of that hyphenated market.

Focusing on the 35-mile specified zone, the Commission noted that the 35-mile zones of the stations in the other markets totally encompassed the 35-mile zone of Newark. Thus, Newark was at the core of this major New York, New York-Linden-Paterson, New Jersey market. However, since Newark was considered a smaller TV market under the rules its television stations were only entitled to cable carriage in Newark. Television stations licensed to Linden or Paterson, however, with which Newark television stations compete, were entitled to market-wide cable carriage under the major TV market rules governing such hyphenated markets. This created an anomalous situation in which the Newark station was handicapped in competing with the other stations.

The *Newark, New Jersey* case differs from the instant situation in certain critical respects. First, the 35-mile zone of Melbourne's WMOD–TV is not wholly encompassed by the other communities' 35-mile zones, as was the case in Newark. Here, Melbourne's 35-mile zone only slightly overlaps Orlando's 35-mile zone and never gets within 20 miles of the outer edge of Daytona Beach's 35-mile zone.

Second, because of the overlap in *Newark, New Jersey*, the stations competed with one another in *each* of the communities of license. Here, the Melbourne station may compete with Daytona Beach stations *in Melbourne* (since Daytona Beach's Grade B contour extends to Melbourne), but the Melbourne station obviously does not compete with Daytona Beach stations in Daytona Beach–because the Melbourne station doesn't reach Daytona Beach. If Grade B contours had been examined in *Newark, New Jersey*, the difference from the Melbourne situation would have been all the more clear. Melbourne does fall within Daytona Beach's Grade B contour, but Melbourne's Grade B contour does not even reach Daytona Beach. By contrast, Newark's Grade B contour overlapped with the Grade B contours of New York City, Linden and Paterson, New Jersey so that there was *mutual* economic reliance. In that case, therefore, the various communities truly operated as a single market. The redesignation was thus simply a *pro forma* change to reflect the reality of the situation.

Because the reality of the Melbourne-Daytona Beach situation is so different, I fail to find any basis in *Newark* for granting petitioners' requests here. I find the case of *Television Muscle Shoals*, 48 R.R. 2d 1191 (1980), *recon. denied*, 87 F.C.C. 2d 507 (1981), in which the Commission denied a redesignation case, to be much more on point.

In *Television Muscle Shoals*, petitioner sought the addition of the smaller TV market of Florence, Alabama to the existing Huntsville-Decatur, Alabama hyphenated major market designation. The majority attempts to justify its conclusion in the instant case by applying a four-part analysis taken from the *Television Muscle Shoals* decision.[3] Examination of each of the factors relied on in *Television Muscle Shoals* leads me to conclude that denial of the request to hyphenate is likewise warranted here.

First, the Commission, in *Television Muscle Shoals* looked at the distances separating the communities whose hyphenation had been proposed. As explained by the Commission, "the greater the separation between cities involved, the thinner the common bond allowing both to be considered part of the same market." 48 R.R. 2d at 1193. In that case, the fact that 75 miles separated Florence and Huntsville weighed against their being joined as a single market. Melbourne is approximately 75 miles from Daytona Beach. Accordingly, I find the distance here very similar, not "appreciably less," as the majority finds, than in *Television Muscle Shoals*.

Second, the Commission in *Television Muscle Shoals* examined whether hyphenation would expand cable carriage rights beyond the station's Grade B contours. In *Television Muscle Shoals*, most of the area in which the Florence station sought expanded must carry rights fell outside its Grade B contour. A significant percentage of the area in which Melbourne station WMOD would acquire expanded carriage rights is similarly outside of its Grade B contour. The fact that Melbourne lies with Daytona Beach's

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[3] I am not sure that the Commission was doing anything more than analyzing a series of factors in *Television Muscle Shoals*. As discussed at n.4, *infra*, I also find that the Commission relied on more than four factors in that case.

Grade B contour does not change the fact that Daytona Beach lies outside the Grade B contour of Melbourne's WMOD-TV.

The Commission in *Television Muscle Shoals* also examined whether Florence's TV station was available off-air in Huntsville's 35-mile must-carry zone.[4] The fact that was very little over-the-air audience in that zone also weighed against hyphenation. As the Commission explained: "The lack of cable television carriage thus cannot be said to be impeding the station from reaching its natural over-the-air audience." 48 R.R. 2d at 1194. Melbourne's WMOD-TV is likewise not being impeded from reaching its natural over-the-air audience by not being carried by cable systems in Daytona Beach. WMOD-TV's Grade B contour never reaches Daytona Beach's 35-mile zone.

Next, the Commission in *Television Muscle Shoals* looked for the presence of a clear showing of particularized need by the station requesting the hyphenation. The majority finds that Melbourne station WMOD's particularized need is demonstrated by its showing that, unlike other stations in the Orlando-Daytona Beach market, it faces a competitive disadvantage because it cannot demand cable carriage in certain portions of the Orlando-Daytona Beach market. The majority misses the mark. The Orlando-Daytona Beach stations' Grade B contours cover that market and therefore can appropriately request cable carriage. Melbourne, however, is not now viewed off-the-air in Daytona Beach, so it is not *dis*advantaged by not being carried by cable. Under the majority's logic, any TV station could make a particularized need for cable carriage anywhere, regardless of whether its off-air signal is available in that location.

Finally, the Commission in *TV Muscle Shoals* sought an indication of benefit to the public from the proposed change. The majority in this case concludes that the public will benefit by adding Melbourne and Cocoa to the Orlando-Daytona Beach hyphenated market because, the additional hyphenation will not merely provide duplicative network programming and (unlike *Television Muscle Shoals*) the additional programming will serve the needs of the Orlando-Daytona Beach audiences.

The fact that WMOD is an independent station, as opposed to a duplicative network affiliate, does distinguish it from *Television Muscle Shoals*, but I question whether this fact alone demonstrates a public benefit sufficient to warrant changing the existing

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[4] The majority fails to list this as a factor examined by the Commission in *Television Muscle Shoals*, although it was discussed immediately following the Grade B contour analysis. *See* 48 R.R. 2d at 1193-94.

Orlando-Daytona Beach market designation. Were there sufficient public interest in receiving WMOD–TV, cable systems in this market with adequate channel capacity could have already decided to carry the signal of WMOD.[5] However, even if the fact that this were an independent station suggests a public benefit, none of the other factors is met in this case; and one out of five does not justify redesignating the market.

In sum, I believe that refusing to redesignate the Orlando-Daytona Beach major TV market would be consistent with prior Commission decisions in *Newark, New Jersey* and *Television Muscle Shoals*.

5. The majority decision fails to consider adequately a potentially serious copyright issue.

The majority dismisses concerns that were raised by a commenting cable operator in the Orlando-Daytona Beach market (Group W) that, if the Commission redesignates the market, Group W may be required to carry WMOD-TV and, at the same time, be required to pay distant signal fees under the Copyright Act. The majority summarily determines that WMOD-TV's signals should be considered "local" for purposes of the Copyright Act, thereby purportedly freeing operators of an obligation to pay royalty fees for their carriage. This conclusion is reached despite the fact that for copyright purposes, local signals are defined in Section 111(f) of the Copyright Act as those which were subject to mandatory carriage pursuant to the FCC's Rules in effect on April 15, 1976; and in 1976 the hyphenated market was Orlando-Daytona Beach, not Orlando-Daytona Beach-Melbourne-Cocoa. The majority admits that its determination is not binding on the Copyright Royalty Tribunal. The Tribunal could conceivably rule the other way, thereby subjecting cable operators forced to carry Melbourne and Cocoa television signals to additional copyright liability.[6] Furthermore, the copyright Royalty Tribunal may view the Commission's decision in this case as indicative of future changes to the major TV markets list and decide to require an overall reevaluation of royalty fees with respect to must-carry signals. I believe that the majority's discussion dismisses the potentially serious ramifications of the copyright issue for cable operators all too casually. The copyright ramifications of this decision warrant closer attention.

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[5] *See*, 47 C.F.R. Section 76.61(b). And, of course, any "significantly viewed" over-the-air signals are also subject to must-carry. 47 C.F.R. Section 76.61(a)(5).

[6] Similarly, cable operators in the Melbourne market may also face additional copyright liability. Micro, operator of a Vero Beach, Florida cable system (located in the Melbourne specified zone) commented that adding Melbourne to the Orlando-Daytona Beach market would subject it to mandatory carriage of Orlando and Daytona Beach stations and potentially require it to pay over $100,000 annually in additional copyright royalty fees.

6. The Commission's decision may result in a deluce of similar requests.

In addition to the legal deficiencies that I have mentioned, the policy ramifications of the majority's decision are also troubling. Despite protestations to the contrary by the majority in the *R&O*, the decision opens a door that was formerly shut in all but anomalous situations. By its decision in this case, the majority has rendered hollow the Commission's 1972 statement that major TV market redesignations would generally *not* take place. Instead, the Commission has agreed to redesignate a market where a smaller market is in the shadow of a larger market. Every television station in a similarly situated market may ask the commission for a market redesignation.

The Mass Media Bureau estimates that there may be 445 similarly situated television stations who would like cable carriage in a neighboring community. While the petitions would not all be grantable. The Bureau does expect to receive petitions from a significant percentage of these stations. Any petitions granted, in turn, would probably spur cable systems to file waiver requests. All told, the Bureau estimates that it may take 8 to 11 additional person workyears to process these requests. Given the number of times this Commission has cited undue administrative burden as a reason for various actions or inactions, I find it surprising that the *R&O* does not consider the burdens here. The majority's declaration that it is not making a change in Commission policy will not prevent other petitions from being filed. The deed speaks for itself; and the deed is done.

7. The majority is setting a bad policy that is not supported by public interest determinations.

Obviously, there are times when policy changes are warranted and we have to bear the resulting administrative burden. This is not such a case, however. The precedent being set here is bad policy because it expands the mandatory carriage provisions of our cable rules to an unnecessary and undesirable degree. The must-carry provisions were adopted for a specific purpose — primarily to promote localism by maintaining the competitiveness of local stations. The key, therefore, is the local market.

In the case at hand, Daytona Beach simply is not part of Melbourne's "local" market by any definition — even the Grade B contour relied on by the majority. WMOD-TV's signal does not reach Daytona Beach, so there is no threat of competitive harm or threat to localism if Daytona Beach cable systems do not carry WMOD-TV. In short, there is no basis for requiring mandatory carriage. Now this is not to say that WMOD-TV will not reap an advantage by the Commission's decision to require mandatory carriage. The effect of the Commission's decision is to *extend* the coverage of WMOD-TV, an undependent UHF station, to equal the coverage of the stronger VHF stations in Orlando and Daytona Beach. This may be a audable result, but it is not the goal of the must-carry provisions of the rules to extend television stations' coverage, only to maintain it.[7]

8. *A regulatory flexibility analyis should have been included.*

This expansion of the mandator carriage provisions of the cable rules is made at the expense of the cable operators, who must bear the cost of cable carriage (and may also be required to pay distant signal fees). Because this could have a particularly deleterious effect on small cable operators, I am disturbed by the majority's failure to include a regulatory flexibility analysis.

Indeed, at least one cable operator in the market filed comments indicating that some small businesses would incur significant expenses, citing those related to the operation of microwave equipment necessary to receive the new signals. Yet the Commission has certified under Section 605 of the Act that adding Melbourne and Cocoa to the Orlando-Daytona Beach major TV market listing will not have a significant economic impact on a substantial number of small businesses.

Cable systems may have to purchase additional microwave equipment to receive these new signals, particularly since some of these systems are located well beyond the natural over-the-air range of the signals of the Melbourne and Cocoa stations.[8]

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[7] Indeed in the *Cable R&O* the Commisison specifically stated that one of its two objectives in approaching the signal carriage issue was "to assure the 'local' stations are carried on cable television systems and *are not denied access to the audience they are licensed to serve.*" *Id.* at 173 [emphasis added]. WMOD-TV is licensed to serve Melbourne.

[8] For example, Melbourne Station WMOD-TV would appear to have mandatory

Depending on the number and extent of the cable systems involved in the new Orlando-Daytona Beach-Melbourne-Cocoa hyphenated market, the total costs for small cable operators may be substantial. Thus, the Commission's analysis under the Regulatory Flexibility Act may not accurately reflect the total impact of its action on small businesses.

For these reasons, I dissent.

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carriage rights on the Flagler Beach cable system (located in the Daytona Beach specified zone). Flagler Beach is approximately 105 miles from Melbourne, and 28 miles from WMOD's Grade B contour. Similarly, the Vero Beach cable system (located in the Melbourne specified zone) may be required to carry the signal of Daytona Beach station WESH-TV, even though Daytona Beach is approximately 114 miles from Vero Beach and WESH's Grade B contour is nearly 30 miles from Vero Beach.

Common Carrier Computer II
Customer Premises Equipment
Subsidiary Separate

Memorandum Opinion and Order **adopted approving permanent capitalization plans filed by the Regional Bell Operating Companies (RBOCs) for operation of separate subsidiaries in provision of customer premises equipment (CPE) and enhanced services. Order directs regions to file reports in regard to operations of their Centralized Operations Groups (COGs) and modifications to regions' plans for providing administrative services to their CPE subsidiaries. In addition, the regions are directed to conduct semi-annual samples of time spent on dial tone referral and to evaluate whether all costs associated with the service are charged to subsidiary.**
— Amer. Info. Technologies, Inc.

FCC 85-28

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
American Information Technologies, Inc.	ENF No. 84-25
BellSouth	ENF No. 84-26
Bell Atlantic	ENF No. 84-27
NYNEX	ENF No. 84-28
Pacific Telesis	ENF No. 84-29
Southwestern Bell	ENF No. 84-30
US West	ENF No. 84-31
Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services.	

MEMORANDUM OPINION AND ORDER

Adopted January 18, 1985; Released February 4, 1985

BY THE COMMISSION:

I. INTRODUCTION AND BACKGROUND

1. We have before us capitalization plans for subsidiaries of the seven regional Bell operating companies (BOCs) established pursuant to our decisions in the *BOC Separation Order*[1] *and the Second Computer Inquiry*.[2] The plans, filed on June 30, 1984, present for our approval proposals for funding separate corporations to provide customer premises equipment (CPE) and enhanced services.[3] The plans also describe the BOC's compliance with our structural separation conditions and explain how the BOCs will account for those services we allow them to provide to their subsidiaries. The action we take today approves BOC proposals

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[1] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117 (1984) (BOC Separation Order), *reconsideration denied*, 49 Fed. Reg. 26056 (released June 26, 1984) (BOC Separation Order Reconsideration), *aff'd sub nom.*, Illinois Bell Telephone Company v. FCC, 740 F.2d 465 (7th Cir. 1984).

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

[3] The following capitalization plans were filed by the Regional Bell Operating Companies: (1) Final Capitalization Plan for Illinois Bell Communications, Inc., filed by American Information Technologies, Inc. on July 2, 1984; (2) Final Capitalization Plan for Indiana Bell Communications, Inc., filed by American Information Technologies, Inc. on July 2, 1984; (3) Final Capitalization Plan for Michigan Bell Communications, Inc., filed by American Information Technologies, Inc. on July 2, 1984; (4) Final Capitalization Plan for Ohio Bell Communications, Inc., filed by American Information Technologies, Inc. on July 2, 1984; (5) Final Capitalization Plan for Wisconsin Bell Communications, Inc., filed by American Information Technologies, Inc. on July 2, 1984; (updated financial data for each Ameritech subsidiary filed November 14 and November 27, 1984; (6) Capitalization Plan for the Sale of Customer Premises Equipment and Enhanced Services by Subsidiaries of BellSouth Corporation, filed by BellSouth Corporation on July 2, 1984; (7) Permanent Capitalization Plan for PacTel Communications Systems and Operational Plans for Pacific Bell and Nevada Bell, filed by The Pacific Telesis Group on July 2, 1984; (8) Capitalization Plan of the Bell Atlantic Companies for Provision of Customer Premises Equipment and Enhanced Services, filed by Bell Atlantic Management Services, Inc. on July 2, 1984; (9) NYNEX Business Information Systems Company Capitalization Plan, filed by NYNEX Service Company on July 2, 1984; (10) Permanent Capitalization Plan for Southwestern Bell Telecommunications, Inc. filed by Southwestern Bell Corporation on July 2, 1984; Supplement filed November 9, 1984; (11) Formal Capitalization of Northwestern Bell Information Technologies, Inc., filed by Northwestern Bell Telephone Company on June 30, 1984; (12) Plan of Capitalization of Mountain Bell Technologies, Inc., filed by Mountain States Telephone on June 28, 1984; and (13) Pacific Northwest Bell Capitalization Plan for Pacific Northwest Bell's CI-II Subsidiary, filed by Pacific Northwest Bell on June 29, 1984.

for the capitalization or their subsidiaries. In addition, we adopt the findings and recommendations of the attached staff reports of the Common Carrier Bureau staff concerning compliance by the BOCs with the Commission's rules.

2. As the attached staff reports recognize, the companies have expended substantial efforts in creating CPE and enhanced services companies in compliance with our Rules. The BOCs should be commended for their efforts. These efforts have been made during a time when the seven regional companies were just commencing operations and seeking to deal with the inevitable organizational and managerial problems associated with the largest divestiture in the history of this country. The companies had to develop business strategies and plans while forging new relationships with customers, investors, and regulatory bodies. During this time, the staff conducted sometimes lengthy meetings with the companies. Many potential compliance problems were resolved satisfactorily through this process. However, there are remaining issues, some of which are significant.[4] It is the purpose of this order to resolve those remaining issues.

3. In addition, we recognize that the plans of the seven companies will change as market conditions dictate. Such changes may require the additional capitalization of CPE or enhanced services operations. If the divestiture court approves line of business waivers, additional funds which were originally generated by ratepayers or reserves prudently required for regulated operations may be invested in CPE, enhanced services or other unregulated businesses. We intend to continue to monitor entry into non-regulated businesses to ensure that the companies continue to provide high quality efficient telecommunications service at reasonable terms and charges.[5]

4. We therefore direct the staff to continue to monitor the BOCs and report back to the Commission on any unresolved compliance issues. Also, in addition to this limited continuing oversight, we direct the Bureau to take further action in the following areas: auditing preoperational expenses incurred by regulated entities on behalf of separate subsidiaries; auditing dial

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[4] During this transition period, the Commission has exercised its discretion to take no action with respect to these failures to comply with its Rules. Any future violations, however, will be subject to the full panoply of the Commission's sanctions.

[5] Some of the activities in which the regions are engaged may raise questions regarding their compliance with the MFJ. The Commission does not intend for any of the language in this order or in any of the staff reports to be interpreted as providing our judgment regarding the regionals' compliance with the MFJ.

tone referral costing and accounting; investigating and auditing shared administrative services; and monitoring the impact of our Rules and policies on any line of business waivers granted by the divestiture court.

A. Background

5. In the *Second Computer Inquiry* we decided that enhanced services and customer premises equipment should be detariffed and not subject to Title II regulation. To ensure that the ratepayer for regulated monopoly services does not cross-subsidize these competitive activities and to prevent other anticompetitive practices we concluded that all carriers should separate the revenues and costs associated with the provision or CPE and enhanced services from the revenues and costs associated with the offer of transmission services. In the case of AT&T, however, we found that the *Computer II* goals could best be met by the offer of CPE and enhanced services through a subsidiary which was structurally and financially independent from the basic network. In a series of orders,[6] we approved AT&T's capitalization of a single separate subsidiary, now known as AT&T-Information Services (AT&T-IS), to provide both enhanced services and CPE nationwide.

6. Following the adoption of the *Computer II* rules, in a judicially approved agreement between AT&T and the Department of Justice reflected in the Modification of Final Judgment (MFJ), AT&T agreed to divest itself of 22 of the BOCs.[7] At divestiture, on January 1, 1984, these 22 companies were consolidated into seven new regional companies. The MFJ imposed on the BOCs line or business restrictions which limited the companies to providing exchange telecommunications, exchange access, information service access, Yellow Pages directory services, and to marketing but not manufacturing CPE. The court's order approv-

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[6] American Telephone & Telegraph Co., 90 FCC 2d 404 (1982), *reconsideration*, 91 FCC 2d 578 (1982) (Enhanced Services Capitalization Order), *further reconsideration denied*, 95 FCC 2d 167 (1983); American Telephone & Telegraph Co., 91 FCC 2d 578 (1982) (New CPE Capitalization Order), *reconsideration denied*, 95 FCC 2d 167 (1983); American Telephone & Telegraph Co., Mimeo No. 1600 (released December 30, 1982) (Picture-phone Meeting Service capitalization plan); American Telephone & Telegraph Co., 93 FCC 2d 599 (1983) (Compliance Order); Procedures for Implementing the Detariffing of Embedded Customer Premises Equipment and Enhanced Services, 95 FCC 2d 1276 (1983), *reconsideration*, CC Docket 81-893, FCC 85-35 (released January 29, 1985) (Embedded CPE Detariffing Order).

[7] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

ing the MFJ stated that the question whether there would be structural separation between regulated and unregulated activities of the BOCs was a matter for resolution by regulators.[8] Subsequently, however, in an order addressing motions by several BOCs for waivers of the line of business restrictions, the court stated that BOCs seeking to enter businesses other than those permitted by the MFJ would be required to do so through separate subsidiaries.[9] The court did not describe with specificity the extent of separation which it will require for these subsidiaries.

7. In the *BOC Separation Order* we applied a limited form of structural separation to the divestied BOCs. We modified the requirements of structural separation to permit (1) joint billing for CPE for four years following divestiture; (2) referral of dial tone customers to the separate subsidiary for CPE, provided the customer is informed that other CPE vendors also exist ("dial tone referral"); (3) joint installation and maintenance of residential and single line business CPE; and (4) the opportunity to use an organizational form other than a separate corporation to achieve structural separation provided that the company demonstrates that the corporate form would legally or practically insulate ratepayers from liability for the debts or liabilities of CPE or enhanced services operations. We allowed the BOCs to provide CPE and enhanced services on an unseparated basis for six months, provided they filed interim capitalization plans by January 30, 1984.[10] Operations were authorized through the end of 1984 on the basis of the interim capitalization plans. By order of the Chief, Common Carrier Bureau (released December 21, 1984) this interim authority was extended to January 31, 1985. Final capitalization plans, effective January 1, 1985, were to be filed by June 30, 1984, at which time the BOCs were to have achieved full compliance with the modified structural separation

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[8] 552 F. Supp. at 193 n.251.

[9] United States v. Western Electric, No. 82-01-0192 (D.D.C. July 26, 1984) (opinion describing procedures for consideration of line-of-business waivers), *appeal filed*, United States v. Western Electric, No. 84-5687 (D.D.C. September 24, 1984).

[10] We also required them to file by February 28, 1984 the following items: accounting plans for joint billing, accounting and operational plans for dial tone referral, accounting and operational plans for joint installation and maintenance, accounting plans for shared administrative services, and reports on activities of the Central Services Organization, now called BellCore, and on Yellow Pages operations.

described in the *BOC Separation Order*.

8. In addition, our consideration of the interim capitalization plans resulted in one additional modification to the conditions of structural separation as they apply to the BOCs. In the *Sales Agency Order*,[11] we approved in principle a limited waiver of restrictions on joint marketing. Under this order, BOCs which file sales agency plans demonstrating compliance with the safeguards and conditions set out in the *Sales Agency Order* may employ their subsidiaries as agents to market basic, intrastate services on a commission basis.[12]

B. Procedures and Review Criteria

9. Each of the BOCs filed an interim and a final capitalization plan for at least one of it *Computer II* subsidiaries. Our review of these plans has proceeded on two parallel tracks. First, we invited public comment on both the interim plans and the final plans. Concurrently, the staff conducted a review of the requested capitalization level, corporate structure, and operational plans of each BOC. This process included on-site inspections of the BOCs, the results of which are described in the attached staff reports. Informal discussions between Bureau staff and the BOCs led to the solution of a number of potential compliance problems, leaving relatively few major structural separation issues to resolve in this Order. The written comments of the parties, which are

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[11] Ameritech, BellSouth and NYNEX, Interim Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Service, FCC 84-290 (released July 11, 1984), *reconsideration pending, appeal docketed*, NATA v. FCC, No. 84-1430 (D.C. Cir., August 20, 1984) (Sales Agency Order).

[12] In order to obtain approval of a sales agency plan, we required BOCs to show that any sales agency arrangement made available to the subsidiaries is also made available to unaffiliated vendors on the same terms and conditions which apply to the subsidiary. To further assure fair competition between subsidiaries and other CPE vendors, we required separate subsidiaries to order telephone services for their customers through the same nondiscriminatory centralized operations group mechanism used by other vendors. In addition, we required retention within the regulated telephone companies of sales and sales support staff sufficient to allow the telephone companies to sell all of their services to customers who do not wish to deal with the CPE subsidiary. Ameritech, BellSouth, and NYNEX filed sales agency plans on August 11, 1984, as did Mountain States Telephone Company. All of these companies except BellSouth are currently using their subsidiaries as sales agents pending approval of their plans. In addition, on November 8, 1984, Northwestern Bell Telephone filed a supplement to its capitalization plan seeking approval of a sales agency program. Northwestern Bell also filed a motion requesting immediate interim approval of its sales agency program. We do not decide issues raised by the BOCs' sales agency plans here; these issues will be determined separately. We do, however, grant Northwestern Bell's motion for interim approval subject to the condition that it adhere to the procedures it outlined in its plan.

summarized in Appendix A, not only informed the Commission in its analysis of the capitalization plans but were also of great value to the staff in focusing its analysis.

10. In past proceedings leading to the approval of capitalization plans we have pursued the following objectives: (a) ensuring that transfers of assets during capitalization not serve as vehicles for inappropriate subsidies to the detriment of basic service ratepayers; (b) ensuring that, to the extent costs were incurred in the development of CPE and enhanced services prior to the establishment of the separate subsidiary, such costs are properly accounted for; and (c) ensuring that the subsidiary, at the end of some determinate period, be in a position to establish its financial independence and assume for itself the risks associated with its competitive ventures.[13] In addition, a fourth objective has been to promote nondiscriminatory treatment of the subsidiary by its affiliated telephone company. These criteria, along with structural separation and accounting safeguards, reflect our intention that activities by and on behalf of separate subsidiaries not adversely affect the rates for basic services or the quality and availability of those services.[14]

11. We approach the BOC proposals with those same objectives, but with shifts in relative emphasis dictated by differences in factual circumstances. For example, transferred assets and preoperational expenses, which figured heavily in our deliberations on AT&T's capitalization plans, comprise but a small portion of the capitalization requested by the BOCs. Therefore, while proper treatment of these items remains important, it seems unnecessary to analyze these areas in detail prior to approval of the BOC plans. On the other hand, the BOCs have, in the short time that has elapsed since divestiture, developed in diverse ways. They have presented us with numerous subtle variations on the theme of structural separation. In those few instances in which one or two companies have failed to comply with the requirements of our

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[13] *See, e.g.*, Enhanced Services Capitalization Order, 90 FCC 2d at 411.

[14] We also recognize that most of the BOCs have petitioned the divestiture court for at least one MFJ waiver to permit entry into unregulated lines of business which would otherwise be prohibited under the terms of the MFJ. The Court approved 13 of these waiver requests on December 14, 1984. While the conditions established for eligibility for MFJ waivers neither replace nor modify the structural separation conditions contained in our *Computer II* rules, we are concerned with the impact the grants of such waivers may have on the operating companies and on the capitalization and operations of *Computer II* subsidiaries. Therefore, we direct the staff to monitor the MFJ lines of business waiver proceedings and report back to us on the impact the waivers may have on BOC compliance with our rules and policies.

rules, fairness dictates that we take steps to bring these companies into line with those who have made a sufficient effort at total compliance. Accordingly, we devote more attention to structural separation issues as an aspect of our initial approval of the capitalization plans than was necessary in the case of AT&T.

II. COMMENTS OF THE PARTIES

12. Comments, Reply Comments and Supplemental Comments were filed by the Association of Data Processing Services Corporation (ADAPSO), the Independent Data Communications Manufacturers' Association (IDCMA), the North American Telecommunications Association (NATA), the Ameritech Operating Companies, the NYNEX Companies, Mountain Bell, the Northwestern Bell Telephone Company, the Pacific Northwest Bell Telephone Company and the Southwestern Bell Corporation.[15]

13. None of the commenting parties has objected to the levels of capitalization requested by the operating companies. Rather, the comments focus on whether particular elements of the regions' plans are in compliance with the Commission's structural separation requirements. ADAPSO and NATA both argue that the plans in general fail to provide sufficient justification for the services which the operating companies propose to share with their subsidiaries and that the proposed levels of sharing raise questions regarding the degree of separation to be maintained between regulated and unregulated operations. ADAPSO states that both Ameritech's transfer of Centrex customer to the operating companies' subsidiaries and the plans of Pacific Northwest Bell and Northwest Bell's to license new product development ideas to their subsidiaries for a 10% or less royalty are anticompetitive.

14. ADAPSO, IDCMA and NATA each object to BellSouth's unincorporated division structure and argue that such a structure prevents the divisions from becoming financially independent and also provides ratepayers with insufficient insulation from the divisions' liabilities. IDCMA objects, as does NATA, to the presence of the vice presidents for marketing of the Ameritech operating companies serving on the boards of the CPE subsidiaries, to Bell Atlantic's and Pacific Northwest Bell's plans for operating company marketing personnel assigned to large ac-

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[15] A summary of the comments has been placed in the files in this proceeding. Several of these parties filed motions to accept late filed comments and reply comments. All such motions are hereby granted; all motions in opposition to file comments and reply comments are denied.

counts to make referrals to the CPE subsidiary and to the scope of administrative services provided to subsidiaries by the operating companies.

15. NATA and IDCMA raise continued objections to both the procedures and the costing methodology used by the operating companies in providing dial tone referrals to their subsidiaries. NATA points out that US West has established two subsidiaries, Firstel and Interline, which are engaged in various aspects of providing CPE and related services, for which no capitalization plans have been filed and recommends that the companies be enjoined from further activities until they have filed such plans. NATA objects to Pacific Telesis' proposal for the operating company and a CPE vendor, including its own CPE subsidiary, to make joint presentations for services and products to potential customers.

III. CAPITALIZATION

A. Compliance Issues

16. Under Section 64.702(d)(4) of our Rules, an entity subject to structural separation must obtain Commission approval as to the manner in which a separate subsidiary is capitalized prior to obtaining any interest in the separate corporation or transferring any assets to it. Approval must also be obtained for any modifications to a Commission approved capitalization plan. Before considering the BOCs' proposals for funding their subsidiaries, we address several questions which have arisen concerning the application of Section 64.702(d)(4) to the BOCs.

17. US West and Ameritech have challenged the Commission's authority to require the filing of capitalization plans for CPE and enhanced services subsidiaries which are owned directly by the regional holding companies rather than by the operating companies. None of the other RBOCs has failed to seek our approval of capitalization plans for holding company subsidiaries. In our decision denying reconsideration of the *BOC Separation Order* we rejected the argument that subsidiaries of the regional holding companies which offer CPE and enhanced services are not subject to our jurisdiction.[16] The BOCs have thus been on notice since June 1 that every subsidiary providing CPE and enhanced

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[16] BOC Separation Order Reconsideration, 49 Fed. Reg. at 26058. US West bases its refusal to follow our rules partly on the grounds that it has appealed our jurisdiction in this matter to the courts. Our rules are in effect and must be complied with.

services regardless of the position those subsidiaries occupy within the overall corporate structure must file and receive approval of plans for capitalizing their CPE and enhanced services activities. The Court of Appeals has held that "where statutory purpose could be frustrated through the use of separate corporate entities, the Commission is entitled to look through the use of separate corporate entities, the Commission is entitled to look through the corporate form and treat the separate entities as one and the same for purposes of regulation".[17] We have required that the regions enter the CPE and enhanced services markets only through separate subsidiaries in order to ensure that ratepayers bear none of the costs incurred by these new businesses. This purpose could be thwarted if the regions are permitted to enter these new markets through entities whose capitalization and operational plans are free from Commission review. We also disagree with the claim, advanced by certain RBOCs on several occasions, that the RBOCs' status as holding companies automatically exempts them from classification as common carriers under the Communications Act. We have not yet found it necessary to decide the question whether they are in fact common carriers because, in each instance, other grounds existed for exercise of our jurisdiction. Thus we have not before, and do not here, undertake to analyze the factual circumstances that the RBOCs argue would exempt them from status as common carriers. We therefore conclude that US West's and Ameritech's jurisdictional arguments are without merit.

18. While protesting that the Commission has no jurisdiction over its activities, US West has provided the Commission with certain incomplete information in regard to its directly held subsidiary, US West Services, Inc. It represents such information to be a "voluntary" contribution to Commission understanding of its operations, and styles its material a "final submission." US West is advised that such submissions do not constitute a capitalization plan responsive to the Commission's orders. The capitalization plan which the company must file should include all financial and operational information furnished by the other RBOCs, including five year financial projections, total capitalization amount requested and complete descriptions of the services provided to US West Services by each of the other entities in the region. US West is therefore directed to file its capitalization plan

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[17] General Telephone Company of the Southwest v. United States, 449 F. 2d 846, 855 (5th Cir. 1971).

within 45 days of the release date of this order.

19. Ameritech, on the other hand, while also challenging the Commission's jurisdiction, flatly refuses in its response dated November 30, 1984 to answer questions addressed to it by the staff regarding the capitalization and operations of its directly held subsidiary, Ameritech Communications, Inc. While parties are free to appeal our decisions, absent a stay of an order, they are obliged to comply with our rules and are not free to decide whether to comply with a particular order. The staff is directed to serve notice forthwith upon Ameritech that it is required to file a capitalization plan for its directly held subsidiary and that Ameritech, within five days of the date of the letter, is to affirmatively respond that it will file such a plan within 45 days of the release date of the order. If Ameritech fails to file such response the Commission will issue a notice of apparent liability and propose a fine of $2000 per day commencing on the sixth day after the date of the letter and running each day thereafter.

20. If these plans are not filed, or if they do not contain sufficient detailed information to allow us to evaluate whether the plans comply with our Rules, these regions must stop providing CPE and enhanced services through their non-approved subsidiaries. Furthermore, we expressly condition the grant of any future section 214 applications to Ameritech and to US West or to any of their subsidiaries on compliance with our capitalization plan filing requirements.

21. Another question concerns the timing of the filing of capitalization plans. Our rules require that plans be filed 180 days in advance of the transfer of funds or assets to the subsidiary in order to allow adequate time for examination of the plan by the public and by the Commission. *Further Reconsideration*, 88 FCC 2d at 537. In order to expedite the reentry of the BOCs into competitive markets after divestiture, we allowed them to begin CPE and enhanced services operations immediately without structural separation, subject to later filing of interim and final capitalization plans. We did not intend, however, to depart permanently from our policy of requiring public notice and comment and Commission approval for capitalization plans prior to the transfer of funds or assets.

22. We are concerned that, with the possible exception of BellSouth and Bell Atlantic, the BOCs do not appear to have requested approval for the total amounts of capitalization which will ultimately be required if the companies decide to alter market

strategies, or start new CPE businesses. We understand that the business plans of some companies may not have been fully formed in time for them to make complete capitalization proposals this year. We also recognize that changing marketplace opportunities, grants or denials of MFJ line of business waivers by the District Court, and our own actions in pending proceedings may result in changes to these plans. Nevertheless, we remind the BOCs that any amendments to their final capitalization plans which include requests for additional capitalization must be filed 180 days before the funds are needed by the subsidiary. We urge those companies which reasonably anticipate the need for additional capitalization during 1985 to make their amended filings at the earliest possible date. We will endeavor to process timely requests as expeditiously as possible.

B. Funding Levels

1. Potential Effect of Total Capitalization Amounts On Ratepayers

23. Our review of the capitalization requests of the BOCs focuses on the extent to which capital transfers to separate subsidiaries might impair the integrity of their portions of the nation's telephone network resources, raise unduly the cost of capital required to fund basic services, or otherwise affect adversely rates for basic services or the quality of those services. As the following table demonstrates, the maximum amount requested was $364 million:

Table 1
Capitalization Requests

RBOC	*(1) equity & debt financing ($ millions)*	*(2) asset transfers ($ millions)*	*total capitalization (1) + (2) ($ millions)*
Ameritech	81.4	2.2	83.6
Bell Atlantic[18]	356.0	.0	356.0
Bell South	360.0	3.6	363.6
NYNEX	150.0	1.9	151.9
Pacific Telesis	85.0	2.6	87.6
Southwestern	46.7	1.0	47.7
US West	64.0	1.8	65.8

Viewed in the context of companies averaging $19 billion in assets, $15 billion in net telephone plant, and $8 billion in shareholder equity, the capitalization requests represent at most 2½% of assets or 5% of shareholder equity. Another relevant comparison can be made with capital spending for telephone operations: these companies had projected 1984 capital spending levels of about $1.9 billion each. Table (2) below shows figures for each RBOC.

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[18] Bell Atlantic's corporate structure includes Bell Atlantic Enterprises, a passive holding company, which owns the Bell Atlantic CPE subsidiaries, as well as

Table 2

RBOC Investment Data

RBOC	*Net Telephone investment June 30, 84 ($ Millions)*	*Projected 1984 Construction ($ Millions)*	*RBOC shareholder equity June 30, 1984 ($ Millions)*	*Capitalization request as percentage of equity*
Ameritech	14,491	1,694	6,946	1.2
Bell Atlantic	15,104	1,715	7,249	4.9
BellSouth	19,562	2,374	8,951	4.1
NYNEX	15,575	2,002	7,484	2.0
Pacific Telesis	14,820	2,189	6,317	1.4
Southwestern	14,907	1,813	6,682	.7
US West	14,047	1,837	6,400	1.0

24. Based on the foregoing information, and based upon the more detailed analysis contained in the staff reports, we adopt the recommendation of the staff that the proposal for capitalizing BOC CPE and enhanced services operations be approved. Commitments of capital at the proposed levels should not hamper ongoing telephone construction programs, nor will they cause a change in bond ratings below investment grade. Financial commitments at the levels under consideration should not alter preceptions of the RBOCs in the marketplace as companies where the overwhelming preponderance of resources is dedicated to the maintenance and expansion of the national telephone network. We will continue to monitor allocations of financial resources outside the telephone subsidiaries to assure continued appropriate levels

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other Bell Atlantic investments which are not covered by our Rules. It is unclear what amount will be used for CPE activities. We therefore direct Bell Atlantic to file a report within 30 days of the release of this order including: 1) procedures Enterprises will use to ensure that financing for Computer II and non-Computer II investments are recorded separately; and 2) Bell Atlantic's criteria for determining whether a particular Enterprise's activity is subject to the Commission-approved capitalization limit.

of investment in and maintenance of prudent reserves for network operations.

2. Asset Transfers

25. Transferred assets comprise a relatively small portion of the capitalization of the BOC subsidiaries. Amounts reported ranged from none (Bell Atlantic) to $4 million (NYNEX). In our *CPE Detariffing Order* we determined that net book value adequately approximated the economic value of the embedded base of CPE and supporting assets which were transferred to ATTIS.[19] In accord with this precedent, all of the BOCs have transferred assets at net book value.

26. There is, however, one instance in which items have been transferred to a subsidiary under a valuation method which may be unappropriate. Pacific Northwest Bell (PNB) has transferred seven pieces of software to its subsidiary, COMM+. These are applications programs which were developed for internal use by PNB and which COMM+ now markets to others. COMM+ and PNB have entered into an agreement under which PNB will receive for four years a 10% commission on COMM+ sales of the software to others. PNB does not identify this software as an asset which has been transferred, but rather describes the transaction as a license for COMM+ to use and market the programs. The costs of developing the programs were expensed in "above the line" regulatory accounts in the years in which they were incurred in accordance with generally accepted accounting principles. Therefore, no "net book value" exists for this internally developed software. Nevertheless, as indicated in the US West Staff Report, there is substantial doubt whether the royalty payments COMM+will pay to Pacific Northwest Bell in compensation for the transferred software are adequate to compensate ratepayers. Therefore, Pacific Northwest Bell should file with the Commission within 45 days of the release of this order full justification for its proposed valuation methodology, identifying alternative methods of valuation and why none of those methods

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[19] CPE Detariffing Order, 95 FCC 2d at 1306–1310. Net book value is defined as the original cost of an asset less the related depreciation reserve. *Id.* at 1306 n.40. Because the net book value of real estate often does not approximate economic value; land and buildings would have to be transferred at fair market value. *Id.* at 1292. No BOC, however, has transferred land and buildings to a *Computer II* subsidiary. We also find it appropriate to permit the operating companies to transfer deferred tax reserves and unamortized investment tax credits attributable to the transferred assets to their *Computer II* subsidiaries in accordance with our permission granted to AT&T in the *CPE Detariffing Order. Id.* at 1360.

are more appropriate than the method they have used for compensating ratepayers for the development efforts they funded.

27. Our approval of the manner in which the BOCs have valued transferred assets for purposes of including those assets in their capitalization requests is without prejudice to the prerogatives of the states to use different methods of valuation for state ratemaking purposes. Since the states are in the position to determine whether the transfer of particular assets may be detrimental to the provision of basic services, we also do not preempt the ability of the states to disapprove any transfers of assets or other resources out of the telephone operating companies. This approach is consistent with our decision not to preempt state action with respect to installation and maintenance assets transferred to AT&T-IS in approving its New CPE Capitalization Plan.[20]

3. *Preoperational Expenses*

28. BOCs reported in their capitalization plans preoperational expenses for the period from August 1982 to January 1, 1984 ranging from $2.6 million (Ameritech) to an estimated $8 million (Bell Atlantic). Most companies represent that these expenses were never charged to ratepayers because they were either booked "below the line" by the operating companies or deferred to 1984 and booked to the separate subsidiaries' accounts. One company, Ameritech, reports that it has booked some preoperational expenses in regulated accounts and that it does not intend to reclassify those expenses to unregulated accounts. Ameritech states that it will make sure these expenses are not included in revenue requirements. While this commitment is undoubtedly made in good faith, we are not satisfied that this measure will be fully adequate to protect ratepayers from paying for costs properly attributable to Ameritech's competitive activities. Removal of the entries from regulated accounts is required. Therefore, we direct Ameritech to remove all preoperational expenses booked to regulated accounts.

29. In order that the Commission may verify that all preoperational expenses have been properly accounted for, we direct each BOC in the course of its regular internal audit program to conduct an audit of the identification and accounting treatment afforded preoperational expenses for CPE and enhanced services and to report to the Commission the results of those

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[20] New CPE Capitalization Order, 91 FCC 2d at 589.

audits as well as any actions taken as a result of audit findings. Many of the companies have already provided for such an audit in their schedules, and those which have not should find it a minimal burden which will help ensure that ratepayers bear none of the costs properly attributable to unregulated operations.

C. *Separation of Risk and Outside Financing*

30. While we allow separate subsidiaries in effect to enjoy the benefits of their parents' access to equity capital,[21] we require them to enter the debt market on their own if they require capital beyond approved levels. In the *Enhanced Service Capitalization Order*, we found that, because of the need to isolate the risks of unregulated services, subsidiaries engaged in such activities should be respsonsible for all obligations associated with any outside debt they require. We therefore required AT&T to place the subsidiary's potential creditors on notice that AT&T would not guarantee the subsidiary's debt.[22] For the same reason we also prohibit the BOCs from guaranteeing the debt of their subsidiaries and to place their creditors on notice of this fact.

31. Several BOCs have described outside debt as part of the capital structure of their subsidiaries, but most have not. While we found it inappropriate in the case of AT&T to require outside debt in the early stages of the subsidiary's operations, we attached considerable importance to AT&T's representation that it intended to have its subsidiary obtain outside debt as soon as practicable. We cautioned that AT&T would bear a heavy burden to justify future capitalization requests if the subsidiary did not first obtain outside debt financing independent of AT&T.[23] We likewise see no need to impose a requirement of outside debt on the BOC subsidiaries at this time. We will not now set a date after which we will expect all BOC subsidiaries to be independent. However, in evaluating future capitalization requests we may find it critical whether the company has first obtained its own debt.[24]

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[21] *See* New CPE Capitalization Order, 91 FCC 2d at 590–592 (finding that imposition of outside equity requirement on AT&T's subsidiary was unwarranted.)

[22] Enhanced Services Capitalization Order, 90 FCC 2d at 417.

[23] New CPE Capitalization Order, 91 FCC 2d at 593.

[24] We note that the divestiture court has stated analogously that it will approve applications for waivers of line of business restrictions "only if they incorporate provisions which will ensure that subsidiaries of the Regional Holding Companies engaged in competitive enterprises obtain their own debt financing and that no entity affiliated with the Regional Holding Company will guarantee the debt in a manner that would permit a creditor, on default, to have recourse to the assets of the operating company." United States v. Western Electric,

32. In our *Final Decision* in the *Second Computer Inquiry* we stated our fundamental expectation that subsidiaries formed by regulated companies to enter competitive businesses will, at the end of some determinate period, establish financial independence and assume for themselves the risks associated with competitive ventures.[25] We do not, however, attempt to assess the likelihood that requested levels of funding will result in business success.[26] Our approval of initial capitalization plans has in the past focused, instead, on the impact of the plan on rate levels and service quality experienced by ratepayers. While we are willing to approve the capitalization plans based on our analysis set out in Part III.A.1., above, it is unclear to us whether each of the BOCs has identified for us the total amount of funds they expect to invest in their subsidiaries or the time frame within which they expect their subsidiaries to become independent of ratepayer-generated funds. The question of when the BOCs intend to stop supplying funds to an enterprise must be addressed in future requests for additional capitalization.

IV. STRUCTURAL SEPARATION COMPLIANCE

A. Provision of CPE and Enhanced Services Through Separate Entities

33. In the *BOC Separation Order*, we found that requiring the BOCs to provide CPE and enhanced services through entities separate from the operating companies was, at that time, the most appropriate means of promoting competition while protecting ratepayers from bearing the costs of competitive enterprises. While the *Computer II* rules and our decisions applying those rules speak in terms of carrier provision of CPE and enhanced services through separate corporations, we stated that we could evaluate on a case-by-case basis the propriety of other structural arrangements. We required any BOC proposing such an alternative organizational form to demonstrate that its proposal complied with our Rules. In particular, they were to show how their proposed structures would legally or practically insulate ratepayers from financial losses and debts of the CPE or enhanced services entity.[27] Only one company, BellSouth, originally sought

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No. 82-0192, slip op. at 55 (July 26, 1984).

[25] Final Decision, 77 FCC 2d at 485.

[26] Enhanced Services Capitalization Order, 90 FCC 2d at 414.

[27] BOC Separation Order, 95 FCC 2d at 1139-1140.

to justify the use of a division for the sale of CPE. BellSouth's first proposal involved the sale of CPE by marketing divisions located within each of the BellSouth operating companies; a service company owned jointly by the operating companies would have provided support for the CPE activity. The final capitalization plan retained the marketing divisions within the operating companies but placed them under the direction of a separately incorporated subsidiary of the holding company.

34. A number of commenting parties raised objections to BellSouth's approach to a structural separation. Some pointed out that, particularly in its earliest version, the BellSouth plan did not appear to present the CPE divisions as entities capable of operational independence from the operating companies. Others argued that BellSouth had not insulated the operating companies from ultimate liability for the debts and obligations of the divisions. It was observed that the permanent use of the divisional structure would preclude the possibility that the CPE entities might ever achieve true financial independence, since a division would never be able to secure either debt or equity on its own. BellSouth has informed the Commission that it intends to incorporate its CPE entities as operating company subsidiaries by July 1, 1985.[28] Since BellSouth will be using its divisional structure for a relatively brief time period, we find it unnecessary to determine whether its corporate structure could have provided adequate protection for ratepayers or whether the divisions would have operated consistently with our structural separation conditions. However, as the staff concludes in its report, BellSouth's current practice of accounting for the activities of its CPE divisions in subaccounts of operating company Accounts 316 does not conform to the explicit requirements of Section 64.702(c)(2) that CPE and enhanced service entities maintain separate books of account and may not provide a satisfactory accounting mechanism even during the interim period until the new corporations are established. We therefore direct the staff to analyze the effects of BellSouth's present method of accounting for the activities of its CPE divisions as well as the announced changes in its corporate structure and accounting systems, including the

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[28] Addenda to the Capitalization Plan for the Sale of Customer Provided Equipment and Enhanced Services by Subsidiaries of BellSouth Corporation, filed November 23, 1984 and December 10, 1984. BellSouth's November 23 addendum stated that the incorporation would occur by April 1, 1985. Its December 10 filing stated that the incorporation would be delayed to coincide with the installation of the new accounting system now under development for Advanced Systems. No incorporation date was provided.

degree of separation in which the accounts of the CPE corporations will be kept, and to report back to the Commission on the results of its analysis.

B. Marketing

1. Dial Tone Referral

35. In the *BOC Separation Order* we found that an exception to the general prohibition against joint marketing was warranted to permit BOC operations for regulated services to refer residential and business customers to the BOC's CPE entity, provided the contact persons informed customers that CPE can also be obtained from other vendors. We said:

> [T]he customer contact person for network services may state in a neutral fashion that the company does not supply CPE any longer pursuant to an FCC order, but that CPE is provided both by other vendors and its separate operating arm. The contact person may then ask the customer if he or she wishes to be transferred to the separate organization's marketing personnel and complete the transfer of the call if the customer desires. The BOCs shall, however, bill all direct and indirect costs of providing such referrals to the separate organization pursuant to a Commission-approved accounting plan . . . In addition, we will continue to evaluate the impact upon ratepayers and competition from this referral approach and whether, due to an RBOC's increased market share or some other factor, the referral is no longer warranted. If the referral approach becomes the vehicle for direct marketing of CPE by network personnel or otherwise is abused . . . We will require its termination.[29]

This practice, commonly referred to as "dial tone referral" has been adopted by all BOCs except US West. It is too soon to assess the competitive impact of dial tone referral. However, while we see no evidence that the referral process is being deliberately abused, we see a need to eliminate some confusion which exists concerning what constitutes a "neutral" referral in this context. In addition, we remind companies engaged in dial tone referral that referrals must be carried out in compliance with our restrictions on the flow of customer proprietary information from operating companies to their subsidiaries. Finally, although we do not at this time rule upon the adequacy of the specific dialtone referral accounting plans, we take this opportunity to clarify the overall requirement that subsidiaries pay all direct and indirect costs associated with dial tone referral.

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[29] BOC Separation Order, 95 FCC 2d at 1143 (footnote omitted).

36. *Neutrality*. The staff reports describe several practices which are inconsistent with the concept of neutral dial tone referral. Several companies were observed to include dial tone referrals in incentive programs under which operating company service representatives receive rewards for producing various sales results. We agree with the staff that such incentive programs can be misleading if service representatives interpret them as encouraging the representatives to actively "push" referrals to customers rather than as an incentive to perform the referral in a passive, neutral fashion. BOCs should therefore discontinue any incentive programs which reward service representatives for completing numbers of dial tone referrals. The BOCs must also discourage representatives from urging the customer to accept the referral.

37. Two other practices observed by the staff not only are inconsistent with neutrality but also rise to the promotion of CPE in violation of Section 64.702(a)(1). In one company, service representatives making unsolicited calls to customers in an effort to market network services were also offering referrals to the CPE subsidiary. In another company, operating company personnel were providing customers with price information about the subsidiary's CPE products. These situations have arisen out of a misinterpretation of the dial tone referral permission which requires that we clarify our Order.

38. We permit dial tone referral because we believe the benefits to consumers of being able to obtain information about the availability of CPE at the time they order telephone service justifies the benefit which the referral process confers upon the CPE subsidiary. In line with this rationale, we require dial tone referrals to be conducted in a neutral manner. Our concept of neutrality includes the expectation that dial tone referral will be a passive process initiated by the customer. We recognize that operating company service representatives in the course of arranging for appropriate network services, may ask for information about the customer's CPE.[30] However, legitimate inquiries such as those regarding the FCC registration number of the

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[30] In some instances, the service representatives may not have occasion to ask for information regarding a customer's equipment. In such cases, in order to prevent customer confusion as to his or her obligations, the service representative may inform the customer that "the telephone company no longer provides telephones to customers and it will be necessary for you to furnish your own phone(s) when service is started".

customer's equipment or whether the customer has touch tone or rotary equipment may not be used as vehicles for actively promoting the sale of the subsidiary's CPE. Referrals may be offered only to customers who have already placed a call to order network service and who indicate that they need equipment or who inquire about CPE. Operating company representatives may offer to arrange for the CPE subsidiary to call a customer (or may transfer a subscriber-initiated request as described herein). In addition, under no cirumstances may operating company representatives provide any customer with information such as the price of the subsidiary's CPE or the specific types of CPE available from the subsidiary.

39. In situations where operating company representatives make sales calls either by telephone or on the customer's premises they may answer the customer's questions regarding CPE providers, and in response to a customer inquiry may reference their own subsidiary. They also may provide the customer with the name and telephone number of the CPE subsidiary, but they may not contact the subsidiary on behalf of the customer, other than to provide it the customer's name, telephone number, and date(s) on which line service is to be installed. Any other contact by operating company representatives constitutes joint marketing and goes beyond the limited dial tone referral permitted in the *BOC Separation Order*. In addition, under no circumstances may operating company representatives provide any customer with information such as the price of the subsidiary's CPE or the specific types of CPE available from the subsidiary. Our intention in establishing these guidelines is to ensure that all operating company contacts concerning the provision of network services provide customers with information they request in a neutral fashion and that such contacts do not become opportunities for marketing CPE of behalf of the subsidiary.

40. *Transfer of Calls*. We permit the operating to transfer customers directly to the subsidiary as well as to give the customer a number at which the subsidiary may be contacted. This practice of on-line transfer creates an occasion for marketing personnel at the subsidiary to speak directly with operating company representatives who have at their fingertips valuable information about the customer who is being referred. It is therefore essential that operating companies guard against impermissible transfers of information during the referral contact. The only information which should be provided by the operating

company to the subsidiary should be the name, address, area code and telephone number of the customer. Any additional information may easily be obtained directly from the customer by the subsidiary and should not be passed along to the CPE subsidiary unless the customer specifically directs that the disclosure only be made to the CPE subsidiary, as required by our Rules regarding the transfer of customer proprietary information.

41. *Costing*. The staff reports indicate that the BOCs have had some difficulty identifying the direct and indirect costs of dial tone referrals. Direct costs include not only costs attributable to successful referrals but also the costs for delivery of the statement where the statement is given but the referral is declined.[31] Examples of indirect costs include loadings for insurance, executive expense, legal, service center equipment maintenance. Each of the BOCs has not been tracking the actual times spent during the dial tone referral process. Rather, each of the companies estimates the average time required to conduct the referral. Most of the companies make this estimate based on a sample of actual referrals timed with stop watches. The staff reports point out wide variations in the amount of time which different BOCs estimate is consumed by a dial tone referral contact ranging from 30 seconds to 7 minutes. While uniformity is not required in this area, the magnitude of the variations suggests that some companies may not be correctly calculating the time involved.[32] As we have previously ruled,[33] all time expended in the dial tone referral process, including time spent in responding to customer questions, must be charged to dial tone referral. We note that some BOCs have committed themselves to a semi-annual sampling of the time used to complete dial tone referrals. We find this approach to be beneficial in determining whether all costs are accurately charged to the subsidiaries. Therefore, we direct all the companies to conduct semi-annual representative samples conforming to the support standards of section 1.363 of our Rules of the time spent on referrals as well as to evaluate whether all direct and indirect

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[31] The subsidiary must pay for unsuccessful referral attempts because these costs are not part of the cost of providing basic service. Therefore, the costs of attempted referrals must not be borne by ratepayers, but must be charged to the subsidiary on behalf of which the costs were incurred.

[32] If strict neutrality is adhered to during the course of the referral and only the customer's name, address and telephone number are transferred, we see little reason for such variability in referral times. Companies reporting contact periods of thirty seconds may be underestimating the time required.

[33] BOC Separation Order, 95 FCC 2d at 1143.

costs associated with dial tone referral are charged to the subsidiary.

2. *Joint Bidding*

42. Pacific Telesis has informed the Commission that it has instituted a program whereby the operating companies may submit in one envelope a response to a customer request for proposal (RFP) where the RFP specifically requires that a single source provide both network services and terminal equipment. PacTel argues that it must be able to submit these combined bids in order that centrex should remain competitive with PBX-based systems.

43. However, we find that when the CPE vendor is a subsidiary, a joint bidding program such as PacTel's violates the prohibition contained in Section 64.702(d)(1) barring carriers from promoting CPE on behalf of their subsidiaries. Furthermore, even when the CPE vendor is unaffiliated, PacTel's inclusion of a CPE proposal in an RFP is a violation of the requirement that a carrier subject to structural separation is prohibited from directly or indirectly furnishing CPE except through a separate subsidiary.[34] In our *Sales Agency Order*, we provided a means whereby sales agents of the operating company, could market centrex and other network services on a commission basis. Sales agency allows a subsidiary to respond to a "single source" RFP with a bid that combines centrex (or other network services) and appropriate CPE, as may now be done by other unregulated CPE vendors. We did not authorize the converse, *i.e.*, that the network service provider be permitted to make combined proposals. This is the only means consistent with our rules whereby a BOC may offer to provide a telecommunications system which combines basic network services and CPE. PacTel is accordingly directed to discontinue its joint bidding program.

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[34] Section 64.702(b) of our Rules states that the Commission may prohibit a common carrier "from engaging directly or indirectly in furnishing enhanced services or customer premises equipment to others except as provided for in paragraph (c) of this section, or as otherwise authorized by the Commission." (emphasis added). Section 64.702(c) then states that "(c) A communications common carrier prohibited by the Commission pursuant to paragraph (b) of this section from engaging in the furnishing of enhanced services or customer premises equipment may, subject to other provisions of law, have a controlling or lesser interest in, or be under common control with, a separate corporate entity that furnishes enhanced services or customer premises equipment" provided the conditions of structural separation set out in the remainder of Section 64.702 are met.

C. Information Flow

44. The *Computer II* rules contain two provisions designed to assure that subsidiaries do not obtain an unfair competitive advantage through unique access to privileged information in the possession of affiliated operating companies. Section 64.702(d)(2) requires public disclosure of network information relating to intercarrier interconnection or to the way in which CPE is attached to the network. The rule further requires that when such information is disclosed to a separate subsidiary it shall be made available to the public at the same time and on the same terms and conditions. Section 64.702(d)(3) prohibits disclosure without customer authorization of customer proprietary information and requires that, if unauthorized disclosure is made, the information disclosed must be made available to other CPE vendors on the same terms and conditions. The Staff Reports detail the steps the BOCs have taken to secure their data bases against unauthorized access and to train employees in observing information flow restrictions. It appears that, for the most part, the BOCs have instituted procedures which should promote compliance with Sections 64.702(d)(2) and (3). A few issues, however, remain for us to address.

1. Training of Subsidiary Employees — US West

45. US West apparently believes it unnecessary to train employees of its subsidiary US West Services, Inc. on how to comply with the *Computer II* rules, although it has trained them in antitrust compliance and other legal restrictions on business activities. It has argued that because the subsidiary is separate, there is no further need to train employees. US West Services, Inc. and the three US West operating companies are, however, members of the same corporation. Therefore, absent instructions to the contrary, it is more likely that US West Services employees would be willing to disclose information to affiliated companies than to third parties. Both Firstel and Interline are engaged in activities which bring their employees into regular contact with operating company personnel. The employees thus have the opportunity to take improper advantage of their corporate relationship with the operating companies in ways which might seem unobjectionable to someone unaware of our rules. We believe that training such employees to observe the limits which structural separation places on their interactions

with affiliated carriers is essential to achieving compliance with our *Computer II* rules.

46. We therefore advise US West that, in the absence of procedures designed to ensure that all its employees are adequately informed regarding the requirements of structural separation, we will be inclined to treat violations of our rules with the maximum sanctions available to the Commission.

2. *Information Transfers Incident to Dial Tone Referral*

47. As discussed at para. 37 above, dial tone referral could provide an opportunity for the transfer of information about a customer from operating company service representatives to subsidiary marketing personnel. The Staff Reports identify several instances in which operating companies were found to be providing their subsidiaries with customer proprietary information such as credit ratings or information about the customer's network services or potential CPE needs. One company, BellSouth, discontinued this practice and retrained its employees to ensure that they understood the changed procedures. Some Ameritech operating companies, however, have continued to provide subsidiaries with customer proprietary information without written authorizaion from the customer. We direct Ameritech, as well as all the RBOCs, not to provide to its subsidiaries any information about potential CPE customers other than the customer's name, address, and telephone number.

3. *Access to Operating Company Data Bases*

48. For the most part, the BOCs appear to have taken appropriate steps to prevent unauthorized access to computer systems containing network and customer proprietary information. BellSouth, which allows CPE entities to input billing information directly to the operating company computerized billing systems, has modified the programming of these systems so that CPE employees cannot use them to obtain information about operating company customers.[35] However, another operating company computer system used by BellSouth CPE entities has not been similarly modified. BellSouth's CPE entities use the Loop Maintenance Operations System (LMOS) in maintaining CPE belonging to BellSouth. LMOS contains for every business service customer in the BellSouth region records of reports of

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[35] *See* para. 50, below.

trouble with network services; it also contains information about the location of CPE and can be used in determining whether trouble is located in the network or in equipment. BellSouth has advised the staff that it is unable to partition the data in LMOS in such a way that the subsidiary could have access only to the information about BellSouth corporate CPE, but that the LMOS software can be altered in this way by its owner, AT&T Technologies (Western Electric). While BellSouth has taken a number of precautions to minimize the possibility that CPE employees will make improper use of LMOS, we find these precautions adequate only as interim measures. We are permitting BellSouth to continue its present use of LMOS for up to six months in order to allow it time to either obtain modifications of the LMOS software from AT&T Technologies or to remove the system from subsidiary premises. After six months, if information other than information about BellSouth corporate CPE is still available through LMOS terminals located in the CPE subsidiary, those terminals must be removed from subsidiary premises.

4. *Provision of Customer Information to CPE Vendors by COGs*

49. Each BOC uses a centralized operations group (COG) as a point of contact for customers and vendors of complex CPE systems. COGs were created as a mechanism for assuring nondiscriminatory treatment of CPE vendors in the provision of interconnection services. One typical COG activity is supplying CPE vendors with needed information about a customer's network services. Under our rules, such information may be released to a vendor only with customer permission; unauthorized release to a BOC subsidiary triggers the requirement that the information also be provided to other CPE vendors.

50. The staff reports describe "blanket agency letters" which vendors have filed with some COGs stating that the vendor will not request customer information without the permission of the customer. While it does not appear that any COGs are currently releasing customer proprietary information to vendors solely on the authority of these letters, the existence of such letters makes it necessary for us to clarify the limitations which our rules place on the transfer of information to CPE vendors through the COGs. Improper release of customer proprietary information is difficult to detect absent auditable records of both information releases

and of the authorization of those releases by customers.

51. We remind the BOCs that it is the duty of telephone companies to protect customer proprietary information. Telephone companies should, at a minimum, in their blanket agency letters or in their tariffs, require vendors, including their subsidiaries, which seek customer proprietary information from them, to retain in the vendor's files, written customer authorization for the release of the information. Absent such a telephone company requirement, reliance upon blanket agency letters as authorization for the transfer of customer proprietary information is inappropriate. We intend to rely on our complaint process to enforce violations of our information flow restrictions.

D. Operational Independence

52. Section 64.702(c)(2) of our rules states that separate subsidiaries must operate independently in the provision of CPE and enhanced services. In addition, the rule sets out certain specific requirements: separate books of account, separate officers, separate operating, marketing, installation, and maintenance personnel, and separate computer facilities for enhanced services. In general, the BOCs appear to have created subsidiaries which are capable of independent operations. Furthermore, most have complied with the specific requirements of the rule. The staff reports raise two compliance issues, however, which require our attention.

1. Joint Officers

53. Section 64.702(c)(2) of the rules expressly requires CPE and enhanced service subsidiaries to have separate officers. The scope of this rule has been unclear and several of the regions have allowed their *Computer II* subsidiaries to share officers with the holding company or with other unregulated affiliates. We therefore take this opportunity to clarify the intent and the application of this rule. Our requirement that CPE subsidiaries have their own officers is designed to prevent the intermingling of regulated and unregulated activities in any part of the corporation. The rule helps ensure that the *Computer II* subsidiary independently develops its own marketing and operational plans. It helps limit the potential for anticompetitive joint marketing activities between the regulated sector and the unregulated entities. It reduces opportunities for the exchange of customer proprietary and network information in a manner prohibited by our Rules. The rule therefore prohibits officers of the *Computer II* subsidiary

from simultaneously acting as officers of any regional entity whose activities have a nexus with the activities of the regulated sector. Officers may not be shared, for example, with the holding company or with any entity engaged in providing services to the operating company. We see no policy reason, however, for prohibiting the sharing of officers among affiliated entities that have no nexus with the operating companies, such as between two subsidiaries which do nothing but market unregulated products or services. As the staff reports indicate, a number of companies currently have appointed officers who serve both as officers of the CPE subsidiary and as officers of the holding company or of other affiliates which provide services both to the operating companies in the region. We direct the regions to discontinue the practice of permitting officers of the subsidiary to simultaneously serve as officers of regional entities which have a nexus with regulated operations.

2. *Joint Physical Space*

54. In order for a subsidiary to operate independently it must have its own physical space separate and distinct from any space occupied by its corporate affiliates. We allow joint use of space on an on-going basis only in conjunction with the provision of shared administrative services.[36] Otherwise, we have permitted limited collocation of separated and unseparated operations only as a transitional accommodation pending construction of facilities for the separate subsidiary.[37] Collocation not only could compromise the independence of the subsidiary, but also allowing employees of a newly-created separate subsidiary to work in proximity to former co-workers who remain in unseparated operations can undermine even the best efforts to monitor employee compliance with information flow restrictions.[38] While several companies housed their subsidiaries in operating company facilities during the period from January 1 through June 30, 1984, when unseparated operations were permitted by the *BOC Separation Order*, only NYNEX, to our knowledge, continued to do so after June 30.

55. The staff report indicates that NYNEX originally reported that subsidiary employees would be located at sixteen facilities which also housed other NYNEX affiliates. NYNEX intended to

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[36] Reconsideration, 84 FCC at 85.

[37] New CPE Capitalization Order, 91 FCC 2d at 608-609 (allowing ATTIS to share space on an interim basis with Bell Telephone Laboratories.)

[38] 47 C.F.R. § 64.702(c)(5) (1983).

end such collocation at six locations by January 1, 1985 and at two others in June and September, 1985. Pursuant to discussions with the staff, NYNEX decided to terminate arrangements by July 1, 1985 at five additional facilities where operating company personnel were collocated with subsidiary employees. The subsidiary will continue to occupy three locations where operating company personnel occupy the same building. The subsidiary employees are situated either in different wings or are located on separate floors of these buildings. The staff recommends that NYNEX be permitted to collocate subsidiary employees at these three locations.

E. Additional Matters

1. Centralized Operations Groups

56. In our *Equal Interconnection Order*,[39] we found that Sections 201 and 202 of the Communications Act[40] and the *Computer II* rules require that BOCs establish mechanisms which will guarantee nondiscriminatory provision of network services by CPE vendors on behalf of their customers. We required the BOCs to provide the North American Telecommunications Association (NATA) descriptions of how they would provide equal interconnection to all CPE vendors, including BOC subsidiaries. Each of the BOCs has indicated that it will use existing Centralized Operations Groups (COGs) as the point of contact for CPE vendors.[41] The staff reports indicate that the BOCs have established COG procedures conducive to nondiscriminatory treatment of vendors. It appears, however, that many COGs do not maintain the kind of records which would permit either BOC internal auditors or Commission staff to determine whether the COGs actually achieve

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[39] NATA Petition for Emergency Relief Requiring Non-discriminatory CPE Interconnection, FCC 84-132 (corrected order released April 24, 1984).

[40] 47 U.S.C. §§ 201-202 (1976).

[41] A COG is an organization established by each Bell Operating Company (BOC) to serve as a centralized point of contact for customers and vendors of CPE including key, PBX and multifunction systems. COGs were established pursuant to a settlement agreement between AT&T and some interconnect vendors. *Jarvis, Inc. v. American Telephone and Telegraph Co.*, 481 F. Supp. 120 (D.D.C. 1978) (District Court-approved settlement effective May 27, 1980). COGs process orders for BOC services relating to the interconnection of customer premises equipment including scheduling and coordination services. The first COG was established in 1980 and COGs were operational in all BOCs by the end of 1981.

timely, nondiscriminatory service provision and interconnection.

57. Therefore, in order that we may carry out our responsibility to enforce sections 201 and 202 of the Act, we direct the BOCs to review their records of interconnection services to vendors and to report the results of that review to the Commission on June 1, 1985, and annually thereafter. These reports should include a description of how the COGs' records are kept and should state the number of requests for interconnection received from BOC subsidiaries, the number of requests received from third party vendors, the number of times service requests by subsidiaries were not met and the number of times requests by third party vendors were not met. In order to ensure that these reports furnish adequate information, we also direct the regions within 60 days of the release date of the order, to file with the Commission a description of the statistics they propose to provide in their reports and the records that will be utilized in evaluating their provision of nondiscriminatory interconnection. We recognize that compliance with this reporting requirement may require changes in the way some COGs maintain service records, but we find that the benefits to the public from assuring equal interconnection outweigh the costs to the BOCs of improving their recordkeeping systems. In this regard, we note that BOCs which employ their subsidiaries as agents to sell network services are already required to report annually information concerning the times required to complete order processing, installation, and maintenance of services sold by affiliated and non-affiliated sales agents. *Sales Agency Order*, FCC 84-290, n.47 (released July 11, 1984). BOCs which use their COGs to process orders from sales agents may combine the report required by the Sales Order with the report we require here if they wish to do so.

2. Shared Administrative Services

58. In the *BOC Separation Order* we approved in principle the position that the BOCs should be permitted to share certain administrative services with their separate subsidiaries.[42] We required the BOCs to file plans stating the types of services they

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[42] BellSouth proposed to share billing services in accordance with our BOC Separation Order. Pursuant to our direction in the BOC Separation Order Reconsideration, BellSouth filed on June 14, 1984 a description of its procedures for ensuring that customer's local service was not terminated for failure to pay CPE charges. BOC Separation Order Reconsideration at para. 48. The Bureau granted BellSoth temporary authority to proceed in accordance with the procedures it described in its June 14 filing. Bell South's procedures as described in the June 14 submission are hereby approved.

proposed to share and setting out their methods of accounting for those services. Pending staff analysis of the BOCs' proposals, we allowed the BOCs on an interim basis to share the same administrative services we permitted AT&T to share, provided the unregulated operations are charged with all costs of providing those services.[43] Most BOCs filed shared administrative services plans on February 28, 1984.

59. We realize that we required the plans to be filed at an early point in the evolution of the BOCs' plans for their separate subsidiaries. Since that time, some companies have altered their corporate structures, some have created new subsidiaries, and all have, presumably, developed and refined their business plans. It seems likely, therefore, that companies may also have changed their plans for sharing administrative services. Therefore, in order that the staff may complete its analysis of the BOCs' proposals, we direct each BOC to file within 45 days of the release of this order updated shared administrative services plans. Plans should include the types of services which will be shared, operational plans for sharing services, and accounting plans for assuring that all direct and indirect costs incurred in support of subsidiary operations are paid by the subsidiary.

V. CONCLUSION AND ORDERING CLAUSES

60. ACCORDINGLY, IT IS ORDERED That the findings and recommendations contained in the attached Staff Reports, are ADOPTED.

61. IT IS FURTHER ORDERED That US West, Inc. file within 45 days of the release date of this Order, a final capitalization plan for US West Services, Inc., providing information in accordance with our *BOC Separation Order* and with this Order.

62. IT IS FURTHER ORDERED That American Information Technologies, Inc. file within 45 days of the release date of this Order, a final capitalization plan for Ameritech Communications, Inc., providing information in accordance with our *BOC Separation Order* and with this Order.

63. IT IS FURTHER ORDERED That the Final Capitalization Plan for Illinois Bell Communications, Inc. on July 2, 1984, as supplemented on November 14 and November 27, 1984, is

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[43] BOC Separation Order, 95 FCC 2d at 1148–1149.

APPROVED subject to the determinations rendered herein.

64. IT IS FURTHER ORDERED That the Final Capitalization Plan for Indiana Bell Communications, Inc. filed by American Information Technologies, Inc. on July 2, 1984, as supplemented on November 14 and November 27, 1984, is APPROVED subject to determinations rendered herein.

65. IT IS FURTHER ORDERED That the Final Capitalization Plan for Michigan Bell Communications, Inc. filed by American Information Technologies, Inc. on July 2, 1984, as supplemented on November 14 and November 27, 1984, is APPROVED subject to determinations rendered herein.

66. IT IS FURTHER ORDERED That the Final Capitalization Plan for Ohio Bell Communications, Inc. filed by American Information Technologies, Inc. on July 2, 1984, as supplemented on November 14 and November 27, 1984, is APPROVED subject to determinations rendered herein.

67. IT IS FURTHER ORDERED That the Final Capitalization Plan for Wisconsin Bell Communications, Inc. filed by American Information Technologies, Inc. on July 2, 1984, as supplemented on November 14 and November 27, 1984, is APPROVED subject to determinations rendered herein.

68. IT IS FURTHER ORDERED That the Capitalization Plan for the Sale of Customer Premises Equipment and Enhanced Services by Subsidiaries of BellSouth Corporation filed by BellSouth Corporation on July 2, 1984, as supplemented on November 23, 1984 and December 10, 1984, is APPROVED subject to determinations rendered herein.

69. IT IS FURTHER ORDERED That the Permanent Capitalization Plan for PacTel Communications Systems and Operational Plans for Pacific Bell and Nevada Bell, filed by the Pacific Telesis Group on July 2, 1984 is APPROVED subject to determinations rendered herein.

70. IT IS FURTHER ORDERED That the Capitalization Plan of the Bell Atlantic Companies for Provision of Customer Premises Equipment and Enhanced Services filed by Bell Atlantic Management Services, Inc. on July 2, 1984, as supplemented on August 20, 1984, is APPROVED subject to determinations rendered herein.

71. IT IS FURTHER ORDERED That the NYNEX Business Information Systems Company Capitalization Plan filed by NYNEX Service Company on July 2, 1984 is APPROVED

subject to determinations rendered herein.

72. IT IS FURTHER ORDERED That the Permanent Capitalization Plan for Southwestern Bell Telecommunications, Inc. filed by Southwestern Bell Corporation on July 2, 1984, as supplemented on November 9, 1984, is APPROVED subject to determinations rendered herein.

73. IT IS FURTHER ORDERED That the Formal Capitalization Plan of Northwestern Bell Information Technologies, Inc. filed by Northwestern Bell Telephone Company on June 30, 1984 is APPROVED subject to determinations rendered herein.

74. IT IS FURTHER ORDERED That the Plan of Capitalization Mountain Bell Technologies, Inc. filed by Mountain States Telephone on June 28, 1984 is APPROVED subject to determinations rendered herein.

75. IT IS FURTHER ORDERED That the Pacific Northwest Bell Capitalization Plan for Pacific Northwest Bell's CI-II Subsidiary filed by Pacific Northwest Bell on June 29, 1984 is APPROVED subject to determinations rendered herein.

76. IT IS FURTHER ORDERED That the Bell Atlantic Corporation file within 30 days of the release date of this Order a report describing 1) procedures to be used in recording financing for *Computer II* investments separately from other investments, and 2) criteria to be used by Bell Atlantic for determining whether a particular activity is subject to the capitalization limit described herein.

77. IT IS FURTHER ORDERED That each Regional Bell Operating Company file with the Commission, within 45 days of the release date of this Order, a description of all administrative services to be provided to the regional customer premises equipment and enhanced services subsidiaries by each of the other entities in the region and the accounting methodologies to be used to bill the costs of such services to the subsidiary.

78. IT IS FURTHER ORDERED That each Regional Bell Operating Company report to the Commission on June 1, 1985, and each year thereafter regarding its provision of nondiscriminatory interconnection to all customer premises equipment vendors in accordance with this Order.

79. IT IS FURTHER ORDERED That interim approval is GRANTED to Northwestern Bell Telephone Company to operate in accordance with its Sales Agency Plan.

80. IT IS FURTHER ORDERED That Pacific Northwest Bell Telephone Company file within 45 days of the release date of this Order a report on the valuation methodology used in regard to

the applications programs transferred to its *Computer II* subsidiary, COMM+.

81. IT IS FURTHER ORDERED pursuant to Section 4(i) and (j) of the Communications Act, That each Regional Bell Operating Companies shall take all actions set forth herein.

82. IT IS FURTHER ORDERED, That the approvals of capitalization plans contained herein are made retroactive to January 1, 1985.

83. IT IS FURTHER ORDERED That the approvals, determinations and conditions herein ARE PROMULGATED pursuant to Sections 4, 201-205, 214(c), 218, 220, 408 and 416 of the Communications Act of 1934, as amended (47 U.S.C. §§ 154, 201-205, 218, 220, 408 and 416).

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

OVERVIEW OF STAFF COMPLIANCE AUDIT OF

REGIONAL BELL OPERATING COMPANIES

I. INTRODUCTION

1. In its *BOC Separation Order (Order)* the Commission applied modified *Computer II* structural separation conditions to the enhanced services and customer premises equipment (CPE) offerings of the divested Regional Bell Operating Companies (RBOCs or regional companies). The *Order* permitted the RBOCs to enter these unregulated markets immediately without structural separation, but required that they file interim capitalization plans, effective during 1984, by January 30, 1984 and accounting plans for shared services by Feb. 28. The RBOCs were also directed to file by June 30, 1984, their permanent capitalization plans, effective from January 1, 1985 on. It is the permanent capitalization plans which are the subjects of this report.

2. Six of the seven regional companies filed interim plans in January, 1984, and accounting plans in February. The three US West operating companies also filed interim capitalization and accounting plans in January and February; the US West holding company failed to file capitalization and accounting plans for its directly held CPE and enhanced services subsidiary, US West Services, Inc. The staff reviewed these plans in order to acquire an initial understanding of the corporate structure of the new regions and of their plans for entering the CPE and enhanced service markets. On March 19, 1984, the Chief, Common Carrier Bureau, wrote to each region, requesting that certain additional information be filed with the Commission. Responses were received on April 2, 1984. The staff worked with operating company executives in their efforts to organize their subsidiaries to comply with structural separation conditions. In addition, the staff conducted on-site investigations seeking clarification of regional plans. These clarifications are included and discussed in the individual staff reports which follow this overview.

II. METHODOLOGY

3. The Bureau committed significant staff resources over the past eleven months to its analysis and audit of the RBOCs' capitalization plans. Prior to the date set for the RBOCs to file their interim capitalization plans, the staff developed audit plans and assigned teams to each region. Each team included attorneys, auditors, an economist and a systems analyst. Several staff members served on more than one team. On January 30, 1984 when the regions filed their interim capitalization plans, these teams began their review of the plans, and, where necessary, modified the preliminary audit plan to focus on those areas where a company's plans raised particular concerns.

4. Beginning in February, 1984 and continuing through September the audit teams conducted on-site investigations in each of the regions. Staff spent a week at various locations within in each region; teams returned for an additional three to five days in the BellSouth, Ameritech and Telesis regions. During the course of these on-site visits, members of the team met with officers of the regional holding companies, with managers of the operating companies in the region, and with the officers of the new CPE/enhanced services subsidiaries. The purpose of these audits was to evaluate the regions' compliance with *Computer II* separation conditions. As the staff discovered areas in which a company apparently did not understand the rules, and where there were attendant compliance problems, the staff worked with company executives to develop solutions to those problems. Most of the RBOCs cooperated fully with such efforts.

5. In each region the staff discussed the interim capitalization plan with regional managers and reviewed the RBOC's plan for establishing separate operations for its provision of CPE and enhanced services. These reviews included an examination of the regional corporate structure, analysis of the parent company's plan for financing its new subsidiary or subsidiaries, discussion of its proposals for the independent operation of the new corporations, review of the training programs designed to inform employees of the Commission's structural separation requirements, discussion of dial tone referral procedures and on-site observations at business and residence service centers of the actual dial tone referral process, and review of the RBOC's plan for protecting customer proprietary and network information. Team members also made on-site visits to at least one Centralized Operations Group (COG) in each region to examine procedures established by the region to ensure that the BOCs do not discriminate against unaffiliated CPE vendors in the provision of network services. *See, Equal Interconnection Order*, FCC 84-132 (released April 11, 1984).

6. During the course of these discussions, the staff requested supporting documentation, including correspondence, official memoranda, corporate directives, board minutes, training materials, requests for proposal, contracts and advertising materials. Where a region had conducted an internal audit of a particular area of operation as it related to *Computer II* implementation, such as computer security, the staff reviewed the audit results and the work papers. In each of the regions, the staff found areas wherein the region's plans for the independent operation of the subsidiary did not fully satisfy *Computer II* requirements, as modified by the *BOC Separation Order.* These problem areas were discussed with each of the regions involved and the RBOCs in most cases modified their plans to correct deficiencies. The staff believes that, in general, the final capitalization plans were a

significant improvement over the interim plans submitted in January.

7. The attached staff reports identify compliance problems which were encountered and the regions' responses in correcting those problems. The staff cautions, however, that the identification of compliance problems may not be comprehensive. As previously stated, the teams spent approximately a week in each of the regions; a second site visit lasting less than a week was made to Telesis, Ameritech and BellSouth. During each of these visits the staff conducted interviews and observed the operations at several geographic locations, including the regional corporate headquarters, the operating companies in the region and the headquarters and the telemarketing centers of the CPE subsidiaries. Given the time frame described above, the staff did not have sufficient time in which to observe and discuss each element of interaction between the operating companies and their subsidiaries. In some instances, the teams had to rely upon representations made by regional executives, which could not be verified at that time. As a consequence, the data provided on some companies, particularly in the Ameritech region, is more complete in regard to some companies than for others. The attached reports therefore must be regarded as part of a continuing process in the Commission's examination of the complex new corporate structures that have replaced the old integrated Bell system.

8. Due to the rapid changes taking place in the companies, sections of the reports may not reflect in all respects current conditions in the regions. Ameritech, for example, informed the staff on November 27, 1984, that several of the CPE subsidiaries in the region would require increased levels of capitalization. BellSouth notified the Commission and the staff in October that it would replace its division structure with a subsidiary. In addition, it is highly probable that additional changes may take place during the interim between the writing of this report and Commission action in regard to the capitalization plans. The staff therefore recommends that the Commission direct the regions to keep it informed with respect to any significant changes in business plans affecting the operations of its CPE and enhanced services operations.

III. CPE/ENHANCED SERVICES ORGANIZATIONS

9. Each of the seven RBOCs has established a regional holding company pursuant to Part IV(A)(6) of the Plan of Reorganization filed pursuant to the MFJ. Each holding company then chose a different organizational structure for its provision of CPE and enhanced services. The *Computer II* rules provide flexibility to the companies as to how they structure CPE and enhanced services operations. One region, BellSouth, initially established separate divisions of its two operating companies to market CPE. Telesis, NYNEX and Southwestern Bell, on the other hand, established separate CPE/enhanced services subsidiaries which are held directly by the holding company. A third arrangement, adopted by Ameritech and US West, established subsidiaries held directly by their holding companies, and additional subsidiaries which are held by each of the operating companies in the region. Bell Atlantic formed a passive investment subsidiary which holds several companies which engage in or support CPE/enhanced services activities. Each of these structures is discussed in detail in the attached staff reports.

10. The *Computer II* structural separation rules prohibit a communications common carrier from furnishing enhanced services or CPE except through "a separate corporate entity." In the *BOC Separation Order*, however, the Commission sought to allow each BOC flexibility in planning its entry into unregulated

markets by permitting it to demonstrate that a separate unincorporated division could fulfill the purposes of the separate subsidiary requirement. To justify such an alternative corporate structure a BOC must demonstrate that ratepayers will be insulated from the financial losses or debts of the CPE entity, that the CPE entity will have the same measure of independence that it would have had if separately incorporated, and that all applicable structural separation conditions, other than separate incorporation, are complied with. *Order* at para. 66.

11. One region, BellSouth, proposed to sell CPE through unincorporated divisions. The staff's review of BellSouth's plans disclosed several unresolved problems in its proposal. BellSouth was unable to show that ratepayers could be legally insulated from the losses or liabilities of a division. In addition, the provision of a constant flow of holding company funds into the divisions appeared to be inconsistent with the policies behind *Computer II* for a number of reasons: BellSouth's plan to provide ongoing, as-needed funding to the divisions through the operating companies into the divisions could hamper the detection of improper cost shifting between regulated and unregulated businesses; and BellSouth's method of financing seemed in conflict with the Commission's policy that CPE subsidiaries should become financially independent of their regulated affiliates in a reasonable period of time. In addition, BellSouth's plan called for the divisions to be directly supervised by operating company vice-presidents who also had direct responsibility for overseeing marketing of network services.[1] Such a reporting structure raised doubts about the operational independence of the divisions and appeared to create opportunities for joint marketing in violation of the Commission's rules.

12. BellSouth filed an addendum to its capitalization plan on November 21, 1984, stating that in April, 1985, it will establish separate subsidiaries to replace its divisions. Further consideration of whether the divisional structure satisfies Commission goals, therefore, does not appear necessary at this time.

IV. CENTRALIZED OPERATIONS GROUPS (COGS)

13. In its *BOC Separation Order*, the Commission directed the BOCs to establish mechanisms to be used in providing nondiscriminatory interconnection to all CPE vendors, including BOC CPE affiliates. *Order* at n.20. In its *Equal Interconnection Order*, the Commission directed the BOCs to notify the North American Telecommunications Association (NATA) regarding the mechanism it would use in meeting that requirement. On June 1, 1984, each of the regions which had not previously stipulated that they would do so, filed with the Commissions representations that they would use the already existing Centralized Operations Groups (COGs)[2] to provide such equal interconnection. The staff visited at least one COG in each region, and reviewed its record-keeping system in order to ascertain whether those records constituted an auditable system, as the *Equal*

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[1] The Commission refused to permit BellSouth to have its CPE divisions report to operating company marketing executives in its *Sales Agency Order*, FCC 84-290, n. 37 (released July 11, 1984).

[2] A COG is an organization established by each BOC to serve as a centralized point of contact for customers and vendors of non-BOC key, PBX and multifunction systems. COGs were established pursuant to a settlement agreement between AT&T and some interconnect vendors. *Jarvis, Inc. v. American Telephone and Telegraph Co.*, Civil Action No. 74-1674 (D.D.C. 1980). COGs process orders for BOC services relating to the interconnection of such systems including scheduling and coordination services.

Interconnection Order required. At Bell Atlantic two staff members conducted an on-site analysis of the region's record system to determine whether it was adequate to permit an audit of nondiscriminatory interconnection. While there was insufficient time in which to actually conduct such an audit, the staff concluded that Bell Atlantic had in place an auditable system of records. In the other regions, the staff made only an initial review of the records maintained by the COGs rather than the detailed review made at Bell Atlantic.

14. Our preliminary evaluation of the regions is that the COGs have procedures which are designed to fill orders for network services in a nondiscriminatory manner but often have insufficient records to audit whether timely interconnection actually takes place in a nondiscriminatory manner. While COG managers could demonstrate that they processed interconnection requests in order of receipt, in most cases they did not know and maintained no records to show that interconnection had been effected without preference to orders placed by the operating company's CPE subsidiary. The COG at Illinois Bell, for example, relied solely upon incoming complaints from vendors to identify problems in providing network services. The staff also observed, however, that many COGs are in the process of installing computerized record systems which could be utilized in auditing the provision of nondiscriminatory interconnection. The staff believes that such computerized systems can go far in providing the necessary records to demonstrate nondiscriminatory treatment.

15. The staff recommends that the Commission direct each region to review its records of nondiscriminatory interconnection to all CPE vendors and to report to the Commission on June 1, 1985, and each year thereafter regarding the results of its review. Such reports should include a description of the methods used in evaluation service response times, the number of service requests for interconnection of CPE equipment received from regional CPE subsidiaries and the number received from third party vendors, the number of failures to meet agreed installation dates for the CPE subsidiary or subsidiaries and the number of failures to meet agreed installation dates for third party vendors.

V. EMPLOYEE TRAINING AND INFORMATION SECURITY

A. Training

16. Effective compliance with the Commission's separation conditions necessitates that the operating companies not only establish adequate structural separation mechanisms but that they also train their employees regarding the limitations imposed by the *Computer II* decisions on interaction between the operating company and the subsidiary. Such training, at a minimum, should include explanations regarding the restrictions on the transfer of customer and network proprietary information, the prohibition against joint marketing, and the permitted scope of dial tone referral. Employees should also be afforded an opportunity to present questions to knowledgeable company employees regarding the applicability of the separation requirements to their own work situations and should be given the name of a company employee who can be contacted in the event of subsequent questions.

17. Each of the regions has provided its employees with some training with respect to the *Computer II* separation requirements. These programs have ranged from BellSouth's well organized and comparatively comprehensive program to NYNEX's plan to have each non-managerial employee reached "at least once" by an internal newsletter article. Several regions appeared to have no program

planned until they were informed by the staff that training would be one of the areas discussed during the course of the on-site audit of the region. The material distributed in each region is similar to, and in some cases exactly the same as, that used to inform employees previously about separation requirements in regard to AT&T Information Systems. It generally consists of a six to eight page booklet briefly outlining the *Computer II* separation requirements, with a tear out sheet on the final page which the employee is asked to sign attesting to the fact that the booklet has been read and that the employee agrees to abide by the prohibitions against the transfer of customer and network proprietary information. This sheet is placed in the employee's personnel file. Ameritech, BellSouth and Southwestern reported that some employees have been advised by their unions not to sign this acknowledgement, and that in such cases, the employee's supervisor signs the sheet attesting to the fact that the material was presented to the employee.

18. US West has not provided any compliance training to the employees at US West Services, Inc. and asserts that such training is not required. In the absence of such training, there is an increased possibility that the activities of this subsidiary may be conducted in a manner inconsistent with the Commission's rules. The staff believes therefore that additional monitoring will be required to ensure that US West's directly held subsidiaries operate in compliance with the *Computer II* rules.

B. Protection of customer and network proprietary information

19. Each of the regions also reported that account executives and other operating company employees had been informed that when they transferred to the subsidiary they must not take with them customer specific information. The staff reviewed the directives distributed to employees which identified the kinds of material which could not be transferred to the subsidiary, and discussed with operating company managers the procedures which they used to identify and retrieve records which had been inappropriately transferred. The procedures established appeared in general to be reasonable ones, though the staff had no opportunity to verify that such procedures were actually used.

20. Customer proprietary information is also in the possession of COG personnel and may be released to vendors, including CPE subsidiaries, only with the customer's written permission. It may be necessary for vendors to have such information in order to plan the installation of appropriate CPE to meet a customer's needs. The staff discovered during its audits that several COGs used a "blanket agency letter" signed by the vendor, which stated that the vendor would ask for no information regarding a customer's service unless the vendor had express permission from that customer. The staff discussed these letters with COG managers and with operating company managers, and expressed concern that such blanket letters did not offer a sufficient guarantee that customer proprietary information would not be improperly released. One region stated that it used such letters only to ensure that the vendor assumed liability for the costs of installation services; a second region modified its procedures to allow customer information to be given to vendors by phone, with a requirement that such vendors immediately file a signed customer authorization. The staff recommends that the Commission reaffirm that it is the duty of telephone companies to protect customer proprietary information and that they must ensure that vendors do in fact have on file written

customer authorization for the release of information.

21. The staff also was concerned about protection of the operating companies' sensitive data bases, which are potentially a fruitful source of valuable and sensitive customer and network proprietary information. As a general rule, the operating companies had changed passwords and user IDs and installed protective software programs designed to prevent access by employees who had transferred to CPE subsidiaries. In some cases, the staff found that computers themselves were more physically accessible than they were represented to be by operating company managers. In such cases, the staff informed the region, which instituted remedial measures. In order to protect the security measures in place, the staff reports do not provide detailed information regarding such measures.

VI. DIAL TONE REFERRAL

22. The Commission granted a limited exception to the general prohibition in *Computer II* against joint marketing, to permit BOC operations for regulated services to refer residential and business customers to the RBOC separate organization for CPE, provided that the contact person informs customers that CPE can be obtained from vendors other than the separate organization.[3] The Commission stated that this dial tone referral exception was warranted in order to reduce customer confusion and because the RBOCs would reenter CPE markets with a zero market share in an increasingly competitive market.[4] The Commission established clear parameters for this referral exception: the customer contact person for network services must state, in a neutral fashion, that the BOC no longer provides CPE but that CPE is provided both by other vendors and by its separate CPE organization. If the customer wishes, the contact person may then transfer the customer to the separate organization's marketing personnel. RBOCs wishing to take advantage of dial tone referral were directed to file accounting and operational plans to be used in connection with the referrals.[5] The Commission expressed its intention to continue to evaluate the impact of this referral approach on ratepayers and competition. *Order* at para. 68. The staff therefore devoted substantial effort to an examination of both the plans for, and the actual operations of, dial tone referral in each of the regions. Dial tone referral training, costing methodology and disclosure statements were reviewed. The staff then made on-site observations at the operating company's business service centers and residence service centers to evaluate the thoroughness with which the companies' plans were implemented at the local level.

23. Six of the regions stated that they planned to take advantage of the dial tone referral exception, while only one, US West, stated it would not do so.[6] The staff discovered a number of serious problems in the regions' implementation of dial tone referral procedures. Operating companies were found to have used dial tone referral to transfer customer credit information to subsidiaries, to have engaged in joint marketing efforts, to have used dial tone referral as a mechanism for providing the subsidiary with information about a customer's CPE needs and

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[3] Order at para. 67.

[4] *Id.*

[5] *Id.* at para. 68.

[6] As discussed in the staff report, however, one US West company, Pacific Northwest Bell (PNB), interpreted the Commission's *Order* to permit it to make direct referrals of customers to its CPE subsidiary. PNB has ceased providing such referrals.

service, and to have charged the subsidiary for less than the full costs of dial tone referral.

24. At Telesis, for example, the audit disclosed that operating company personnel were informing customers for network services that the subsidiary, PacTel Comm, would be happy to "deliver to their home or office", that certain operators kept brochures on the types and prices of CPE offered by PacTel Comm, and that some operators were also suggesting to PacTell Comm's marketing personnel the kinds of equipment in which the customer might be interested. Telesis subsequently agreed to revise its disclosure statement to eliminate references to the subsidiary's delivery policies and to retrain operating company personnel regarding the requirements of neutral disclosure.

25. Of continuing concern to the staff is an incentive plan implemented by Telesis under which service representatives earn points for selling various upgrades in network services, such as additional lines, call forwarding, and call waiting to customers. Such points are similar to green stamps and can be used by the employee to obtain a number of gifts from a special Telesis catalogue. Telesis added dial tone referral to the incentive plan and awarded each representative in an office an extra 500 points if the office as a whole met a certain target number of customers transferred to the CPE subsidiary. This program is discussed further in the Telesis report. The staff informed Telesis that this program was a violation of the prohibition against joint marketing and created serious likelihood of jeopardizing the neutrality of the referral process by creating an incentive to refer customers to the CPE operation rather than to simply advise customers of available options in a neutral fashion. Telesis has refused to end the incentive program. The staff recommends that the Commission direct Telesis to cease rewarding its operating company employees for transferring CPE customers to the subsidiary.

26. At BellSouth, the audit disclosed that, in additon to introducing the customer to the CPE division's marketing personnel by name, address and telephone number, the operating company personnel used a letter code to provide credit information on the customer to the CPE divisions. Credit information is customer proprietary information; the Commission's rules provide that such information may not be disclosed to the regulated company's CPE subsidiary or division unless it is provided to the public on the same terms and conditions under which it is disclosed to the subsidiary. 47 C.F.R. 64.702(d)(3). Credit information should not be released to third parties in the absence of express permission by the customer. Following discussions with the staff, BellSouth agreed to cease providing such credit information to the subsidiary and revised its training program to inform service representatives of that change in procedure.

27. Several regions not only furnish the toll free number of the subsidiary and/or provide on-line transfer of the customer to the subsidiary but use dial tone referral as a mechanism for transmitting to the subsidiary a list of sales prospects. The staff has been informed by an Ohio Bell service representative, for example, that service representatives are trained by their supervisors to use their best efforts, even following initial customer refusal to be transferred to the subsidiary, to get the customer to agree to listen to the number of the sudsidiary. Based upon this agreement, the operating company sends the customer's telephone number to the subsidiary for a call-back. At Michigan Bell, business service center representatives not only give customers their subsidiary's telephone number but send the subsidiary a sheet containing information regarding the customer's type of

business and service. The staff recommends that the Commission direct the regions to eliminate all such programs whereby information about the customer, other than name, address and telephone number is provided to the subsidiaries either in written or verbal form.

28. A final area of concern is whether the regions have developed accurate methods of billing the full cost of dial tone referral to the subsidiary including the cost of total time expended on this procedure. Regional estimates of the total employee time involved in a single dial tone referral range from 30 seconds to seven minutes. Such a variation in time for referrals which are in most respects similar raises questions about the sampling methods used by the regions in identifying the amount of time consumed by the referral process. These variations affect the cost of the service. Several regions, including Telesis and Ameritech, had not developed methods for charging the subsidiary for any dial tone costs other than those connected with successful on-line transfers or referrals. Telesis subsequently agreed to develop a methodology for charging the subsidiary for all referral attempts, including those which were unsuccessful. In addition, it is unclear in all of the regions whether the subsidiaries have been charged for all of the costs involved in training the service representatives and whether all overheads have been appropriately accounted for. The staff believes that each operating company should be directed to conduct semi-annual representative samples of the time spent on dial tone referrals and to evaluate whether all direct and indirect costs are charged to its CPE subsidiary.

VII. SALES AGENCY PROPOSALS

29. Pursuant to the Commission's *Sales Agency Order*, *supra*, Ameritech, BellSouth and NYNEX proposed sales agency arrangements under which their CPE subsidiaries would market basic services jointly with CPE. The staff discovered during the course of its on-site audit that Mountain States had established a sales agency arrangement with its subsidiary without benefit of an approved plan. The staff informed Mountain States that it was obliged to file such a plan. Mountain States and Northwestern Bell subsequently filed such sales agency plans. Northwestern Bell requests interim authority to proceed with its plan. Since the *Sales Agency Order* gave such interim authority to Ameritech, BellSouth and NYNEX, the staff recommends that Northwestern Bell be given similar interim authority. The staff reports make no further recommendations in regard to these proposals. Petitions for reconsideration or clarification of the *Sales Agency Order* have been filed by Rolm, by Ameritech and by the North American Telecommunications Association (NATA). A separate pleading cycle was established for these petitions and the sales agency proposals and comments on them are being reviewed by the staff. The staff will make recommendations regarding these sales agency proposals at a later date.

VIII. PREOPERATIONAL EXPENSES AND SHARED ADMINISTRATIVE SERVICES

30. While the staff reports briefly discuss administrative services provided to the subsidiaries by the holding companies and by the operating companies and describe the accounting systems used in identifying the costs of such services, neither the scope or the accounting for these services has been audited. The *BOC Separation Order* permitted the CPE subsidiaries to share those services which the Commission had previously permitted AT&T to share with AT&T Information Systems. *Order* at para. 64. The staff audits suggest that there have been important changes in several region's plans since they filed their February

accounting report with the Commission in regard to the provision of administrative services to their CPE subsidiaries. The staff therefore recommends that the regions be directed to file updated shared administrative service plans with the Commission identifying the accounting for shared administrative services as well as the services they now plan to share.

31. The staff also makes no representations regarding the amounts identified by the regions as preoperational expenses or the methodologies used in identifying and accounting for them. As the staff reports indicate, many regions failed to track such expenses contemporaneously and were therefore obliged to develop estimates of such expenses. In addition, regions report preoperational planning periods ranging from six weeks to over a year. The staff recommends that each region be requested to conduct an internal audit of preoperational expenses and to provide the Commission with a final preoperational expense figure and a description of the methodology used in identifying and accumulating the relevant expenses.

IX. MFJ CONSIDERATIONS

32. The staff reports reference the various line of business waiver petitions filed by the regions with the U.S. District Court. Decisions in regard to these motions may have an impact on the scope of operations of the CPE subsidiaries which the regions have established in response to the Commission's *Order*, or may require the establishment of additional subsidiaries. The Modification of Final Judgment (MFJ) agreed to by the United States and AT&T limited the BOCs' post-divestiture ability to enter competitive markets. Specifically, Section II(D) of the MFJ limited the BOCs' role to the provision of exchange, exchange access and information access services and the provision of natural monopoly services actually regulated by tariff. The Court subsequently required the parties to modify the MFJ to permit the BOCs to provide, but not manufacture, CPE and to retain the function of publishing the Yellow Pages, which the original Plan of Reorganization had proposed to transfer to AT&T on January 1, 1984. The BOCs may not enter any other line of business without Court approval. The MFJ established a procedure, under Section VIII(C), whereby a BOC could petition the Court for a waiver of the line of business restrictions imposed by Section II(D) of the MFJ. Most of the RBOCs have filed one or more line of business waiver requests. Some of the proposed enterprises involved the provision of enhanced services or CPE; others, such as real estate ventures, were unrelated to the telecommunications business. Shortly after the first waiver requests were filed, the Department of Justice suggested that the Court establish a general framework and standards for dealing with these requests.

33. On July 26, 1984, the Court issued an *Opinion* describing the standards and procedures it would follow in ruling on all motions for waiver. The Court first stated that it would not even consider the substantive merits of that a waiver request seeking permission to provide interexchange service until such time as the RBOCs lose their bottleneck monopolies and there is substantial competition in local telecommunications service. The Court also stated that it would not consider waivers which would permit the RBOCs to enter either the information services or

equipment manufacturing markets.

34. The Court set the following four conditions for approval of a proposal:

1) The regional holding companies must conduct competitive activities through separate subsidiaries. The Court stated that conducting activities through such subsidiaries would make intracompany transactions more apparent and that cross-subsidization or other anticompetitive conduct therefore could be more easily prevented or rectified. The Court refused to define specifically the form the subsidiaries should take.

2) Subsidiaries engaged in competitive enterprises must obtain their own debt financing on their own credit and no entity affiliated with the regional holding company may guarantee the debt in any manner that would permit a creditor, on default, to have recourse to the assets of an operating company. The Court asserted that use of operating companies' financial resources or credit for new ventures created a potential for cross subsidization and tended to jeopardize the financial soundness of the operating companies.

3) The total estimated net revenues from activities for which waivers are granted must not exceed ten percent of a regional holding company's total estimated net revenues. The Court reasoned that such a limitation serves to protect the nation's telecommunications service from injury due to failure of management to devote sufficient attention to regulated activities and ensures that the bulk of the investment of the RBOCs remain in exchange telecommunications-related activities.

4) Each regional holding company seeking a waiver must agree in its application that the monitoring and visitorial provisions of Section VI of the Decree apply to its proposed competitive activities.

35. The Court directed the RBOCs to submit waiver requests to the Department of Justice, together with a detailed proposal including the products or services to be offered, the means by which they would be offered, and the conditions proposed for avoiding the problems discussed in the *Opinion*. The Court stated that the Department of Justice would consider the requests, "formally or informally with the requesting RBOC and all other interested parties". On December 14, 1984, the Court issued a *Memorandum and Order* approving thirteen pending petitions for waivers of the line of business restrictions of the decree.

36. The Court's decisions regarding future waiver requests may well affect some of the business activities described in the staff reports and the level of capitalization requested for the *Computer II* subsidiaries. The staff will inform the Commission regarding any changes which result from the Court's actions.

X. PROPOSED LEVELS OF CAPITALIZATION

37. In evaluating capitalization plans filed pursuant to the *Computer II* rules, the Commission staff considers (a) whether the aggregate amount of financing would threaten the carrier's ability to raise capital at reasonable rates and (b) whether the subsidiary can be expected to become financially independent within a reasonable time. In order to make recommendations on these issues, the staff reviewed proprietary operational plans of each of the proposed subsidiaries as well as publicly available financial data, such as the quarterly data filled with the

Securities and Exchange Commission.

38. Table 1 shows the amount of financing and assets each RBOC requests to establish separate CPE and enhanced services subsidiaries. Bell South made the highest capitalization request at $360 million. The Bell South, US West, and Bell Atlantic request contain amounts for future separated businesses that each might wish to start. The amounts shown in Table 1 represent maximum amounts for which approval is sought, and do not represent corporate commitments to fund specific investments.

A. *Availability and Use of Funding*

39. While the RBOC capitalization requests are large, they must be compared to the overall size of these companies. Table 2 shows the total and net telephone plant owned by each RBOC. Net telephone plant and operating telephone company accounts receivable constitute most of each RBOC's total assets. Between 91% and 99% of RBOC net equity is invested in their telephone subsidiaries. The RBOC telephone operating companies must continually fund huge construction programs in order to serve new customers, replace old equipment, and introduce new technology and services. In evaluating capitalization plans, the Commission seeks to ensure that funding new competitive enterprises will not limit the capital available for telephone plant construction.

40. Table 2 additionally shows the actual telephone plant construction for expenditures for the first six months of 1984 as well as whole year estimates that were provided in AT&T's November 8, 1983 "Information Statement and Prospectus" issued to shareholders (Prospectus). Table 3 reflects the RBOCs' ability to fund these huge construction programs with capital generated internally. The primary internal sources of capital for telephone companies are net income, depreciation & amortization, and federal tax benefits. Table 3 also shows the amount of internally generated capital that was projected for each RBOC in the Prospectus. The actual amounts generated during the first half of the year are approximately half of the whole year estimates.

41. The RBOCs primarily use internally generated capital to finance telephone construction and pay dividends to shareholders. Table 4 shows that for the first half of the year, the exchange carrier subsidiaries of each RBOC generated more capital internally than was required for telephone construction and RBOC dividends. It should be noted that all of the RBOCs have dividend reinvestment and employee savings programs which provide additional paid in capital. Table 5 shows the increase in equity capital attributable to each RBOC during the first half of the year.

42. The RBOC telephone operating companies currently fund most or all construction internally. Even if telephone plant construction for the first half of the year had been equal to half of the estimates made in 1983, Ameritech, Bell South, and Bell Atlantic could have financed the program with internally generated funds. The other companies would have required some additional external financing, but not an amount that would have taxed their financing capacity.

43. At one time AT&T and most of its telephone operating companies required substantial "external" capital (external debt and new equity) to finance telephone plant construction programs. It is difficult to compare current construction programs to prior year data because of changes caused by divestiture. On a relative basis, the RBOCs can now internally generate more cash because of

changes in depreciation rates. Another significant change is that the operating companies no longer make large investments in CPE to be offered under tariff.

44. In addition to financing telephone plant construction programs, the RBOCs use their capital to expand other subsidiaries, to finance initial losses incurred by these ventures, for short term investments, and for other corporate purposes. In the Prospectus, RBOCs estimated that excluding telephone plant construction, their investments would range between $17 and $80 million in 1984. The RBOC CPE and Mobile Services subsidiaries are just starting up operations, and some RBOC Yellow Pages subsidiaries are expanding into other directory related businesses. The individual RBOC sections in the staff report discuss other new ventures of the RBOCs. Discussions with RBOC officials confirm that each of the RBOCs will invest significantly more in these non-basic service activities than was originally projected, in part due to entry into new lines of business approved by the Court. Much of this investment in new lines of business occurred during the first half of the year.

45. In order to make these investment, the RBOCs use dividends from their telephone subsidiaries, capital generated from other subsidiaries, the tax benefits associated with consolidating the operating results of profitable and unprofitable subsidiaries for tax purposes, and external capital. Table 5 shows RBOC increases in paid in equity for the first half of the year as well as changes in short term and long term debt. These figures indicate that on balance, the RBOCs have been able to finance most of their requirements without incurring substantial additional outside debt.

46. All of the RBOCs have incurred short term debt over the first half of the year, principally for purposes of cash management. Short term debt often fluctuates with changes in working capital. RBOCs may experience $100 million fluctuations in working capital from quarter to quarter due simply to the dates when payroll and taxes are actually paid. Three of the RBOCs reported significantly higher short term debt during the first half of the year. Officials from these RBOCs state that changes in working capital account for much of these increases.

47. Overall, Ameritech, Bell Atlantic and NYNEX had less debt at the end of the second quarter than they had at the beginning of the year. In filings with the Security and Exchange Commission, only US West and Bell South reported increased amounts of outstanding long term debt. Much of US West's increase, and all of Bell South's increase resulted from those companies deciding to report long term leases and potential anti-trust settlement costs as long term obligations. Northwestern Bell, a subsidiary of US West, issued $150 million in long term debt early in the year, some of which was used to repay existing long term debt. Thus, the RBOCs have not been forced to increase long term debt significantly in order to finance their entry into new markets. Table 5 shows for each RBOC the amount of new equity each RBOC obtained from dividend reinvestment, savings plans, and retained earnings. The RBOCs could have increased their outstanding debt by similar amounts without increasing the debt/equity ratios they had as of January 1, 1984.

48. In sum, the RBOCs are generating sufficient internal funds from their telephone operations, to cover RBOC dividends and telephone plant construction. The staff did not find any evidence that telephone company cash flow would decrease, or that telephone plant construction would significantly outstrip internal

cash generation. It appears that the RBOCs have been able to invest in new lines of business without limiting the availability of capital for telephone construction, or borrowing so heavily that the cost of capital is raised.

B. *Separation of risk*

49. During rate proceedings, the Commission often determines a level of percentage profit or rate of return that carriers can lawfully earn on their net investment in telephone plant. The Commission selects a rate that is sufficient to compensate shareholders for the risk associated with their investment in telephone plant. In evaluating AT&T's capitalization plans, the Commission noted that it may be easier to determine the required return for a company as a whole than to determine the required return for one of the company's regulated subsidiaries. Therefore, the Commission considered whether entry into new markets might cause telephone rates to rise if the Commission were not able to determine the difference in risk between regulated and unregulated operations.

50. In evaluating AT&T's enhanced services proposal, the Commission found that there was a minimal risk to ratepayers because the proposed levels of investment were small relative to AT&T's overall shareholder equity. The Commission accepted AT&T's analysis that even in the highest risk case — complete failure of the subsidiary and loss of the entire capitalization amounts — the impact on AT&T's stock price would be minimal. Therefore, even if the risk wasn't separated out there wouldn't be a significant impact on the rate of return prescribed for regulated service.

51. The Commission did not make a similar determination for AT&T's New CPE and Embedded Base capitalization plans. In those instances AT&T essentially proposed to transfer existing CPE operations out of regulation to a separated subsidiary. Thus, the risk associated with these operations already existed for AT&T shareholders, and would have to be separated in rate proceedings, whether or not the transfer was approved. The Commission found that future rate of return proceedings would be the appropriate forum in which to determine how the risk of unregulated subsidiaries should be accounted in setting carrier rates of return.

52. The staff believes that the risk to ratepayers associated with the RBOC proposals is not significantly different from the risk posed by AT&T's enhanced services capitalization plan. Table 6 shows the percentage of each RBOC's shareholder equity that the capitalization plan represents. Moreover, with the exception of those companies planning to finance customer purchase or lease of CPE, the business plans of the RBOC CPE and enhanced services subsidiaries indicate that the operations will not be capital intensive and that much of the capital would only be needed to finance growth. Thus, the RBOCs have greater flexibility to change operational plans or market focus than AT&T. This greatly reduces the risk that the entire capitalization amount might be lost. In view of these factors, the staff believes that the proposed capitalization levels do not alter the risk of the respective enterprises in any significant manner.

C. *Financial independence*

53. The staff reviewed the plans of RBOC CPE and enhanced services subsidiaries to determine whether these companies were planning to achieve financial independence. The staff did not attempt to judge the prudence of the RBOC's plans or the likelihood that these plans would succeed, or determine whether the entire capitalization request would actually be required. Rather, the staff sought to verify that each RBOC has specific plans, the goal of which is the

financial independence of the enhanced services and CPE subsidiaries by some determinate point of time.

54. In general, the staff found that the business plans were directed at attaining rapid profitability. Those business plans reviewed showed diminishing financial support from affiliates as the companies became profitable, and indicated that each of the companies would be able to finance its own growth in a reasonable number of years. There are, however, two caveats to this conclusion. The strategies of several RBOCs are evolutionary in nature and subject to modification based on operating results. Secondly, BellSouth, US West, and Bell Atlantic have requested capitalization for future CPE and enhanced service activities. Officials of these companies have made oral representations that such operations will be comparable to existing plans. These circumstances indicate that the Commission staff should continue to review subsidiary capitalization plans and results to ensure that the subsidiaries actually move toward financial independence.

55. Several RBOCs plan to have subsidiaries which will finance customer purchase or lease of large business equipment systems. Financing companies, if successful, require large amounts of capital, much of which would normally be borrowed from third parties. The staff has not reviewed business plans for the Ameritech, US West, or Bell Atlantic subsidiaries which will finance customer purchase or lease of CPE. In addition, the staff has not reviewed third party debt instruments or customer leases in order to determine whether there is any potential liability created for affiliated operating companies. The staff recommends that the Commission further investigate the capitalization of these subsidiaries for the purpose of determining whether financing subsidiaries are an indirect means of capitalizing CPE subsidiaries.

D. *Evaluation of specific proposals*

56. Ameritech has proposed that each of its five telephone companies be allowed to capitalize a CPE sales subsidiary. Ameritech proposes a total capitalization of $83.6 million for these subsidiaries, which would amount to approximately 1.2% of shareholder equity in Ameritech. The aggregate amount of proposed financing is relatively small. Each of the telephone subsidiaries projects profitability within a reasonable period of time. These plans were recently revised both because of changed business assumptions and because the Commission's *Sales Agency Order* caused changes in Centrex commission plans. In addition to these subsidiaries, the Ameritech holding company directly holds a subsidiary which provides CPE to end users as well as operational support services to the telephone company CPE subsidiaries. Ameritech has not filed a capitalization plan for this subsidiary. The staff recommends that the Commission approve the Ameritech capitalization request and require the filing of a capitalization plan for Ameritech Communications, Inc.

57. Bell Atlantic has proposed capitalization for Bell Atlantic Enterprises and its four subsidaries. Bell Atlantic proposes a total capitalization of $356 million which would amount to approximately 4.9% of shareholder equity in Bell Atlantic. Bell Atlantic has been able to capitalize Enterprises and its subsidiaries, pursue acquisitions and reduce outside debt at the same time. The staff believes that Bell Atlantic has the ability to provide $360 million in total capitalization while financing telephone plant construction at a reasonable cost of capital. The staff

recommends that the Commission approve the Bell Atlantic capitalization request.

58. BellSouth has proposed $363.6 million total capitalization for its CPE activities. This would amount to approximately 4.1% of shareholder equity in BellSouth. While Bell South has significantly increased short term debt over the first six months of the year, much of this change was due to changes in working capital, and short term debt is not expected to exceed 4% of the total debt and equity capital of Bell South by the end of the year. BellSouth is the largest RBOC, and has the greatest capacity to generate funds internally. It appears that BellSouth's capitalization request, spread over several years as projected, would not unduly increase BellSouth's overall capital requirements. The staff recommends that the Commission approve the BellSouth capitalization request.

59. NYNEX proposes $151.9 million total capitalization for its BISC subsidiary. This would amount to approximately 2.0% of shareholder equity in NYNEX. In the Prospectus, NYNEX was one of two RBOCs which projected a requirement for substantial outside financing in 1984. Through the first half of the year however, NYNEX was actually able to reduce its total debt. The staff believes that the overall capitalization request will not burden ratepayers. The staff recommends that the Commission approve the NYNEX capitalization request.

60. Pacific Telesis proposes $87.6 million total capitalization for its PacTel Communications subsidiary. This would amount to approximately 1.4% of shareholder equity in Telesis. Telesis was the other RBOC which projected a requirement for outside financing in 1984. However, investment in telephone plant ran below the projections in the Prospectus, and Telesis incurred virtually no new outside debt. Had construction run at projected levels Telesis would have required additional outside capital, but the staff believes that adequate financing would have been available. The staff notes that PacTel Communications has already received much of the total financing proposed in the capitalization plan. The staff recommends that the Commission approve the capitalization request.

61. Southwestern makes the lowest capitalization request of any RBOC. The capitalization request was increased recently to $47.7 million, but remains very small in comparison with Southwestern's ability to raise capital, and would only amount to approximately .7% of shareholder equity. The staff recommends that the Commission approve the Southwestern capitalization request.

62. US West has requested $66.4 million total capitalization for its telephone company subsidiaries. This would amount to 1.0% of shareholder equity in US West. The business plans of the subsidiaries are more tentative than those of other RBOC subsidiaries because these companies were formed later, and because these companies are evaluating entry into enhanced services markets which are less established than CPE markets. In the first half of the year US West was the only RBOC to incur new long term debt. The amount of financing proposed, however, would not appear to be a significant strain on the Company's borrowing capacity. The staff recommends that the Commission approve the requested amounts of capitalization, and continue to monitor the business plans of these companies.

63. US West has not requested capitalization for US West Services, Inc., a company that is comprised of two major CPE divisions. Staff review indicates that US West plans substantial capital infusions to US West Services over the next several years. On two occasions the Chief of the Common Carrier Bureau directed US West to file a capitalization plan for this enterprise. The staff recommends

that US West be directed to file a capitalization plan for this subsidiary.

Table 1

*Requested Capitalization for CPE and Enhanced Service Subsidiaries**

RBOC	*(1) equity & debt financing ($ millions)*	*(2) asset transfers ($ millions)*	*(3) total capitalization (1) + (2) ($ millions)*
Ameritech	81.4	2.2	83.6
Bell Atlantic	356.0	.0	356.0
BellSouth	360.0	3.6	363.6
NYNEX	150.0	1.9	151.9
Pacific Telesis	85.0	2.6	87.6
Southwestern	46.7	1.0	47.7
US West**	64.0	2.4	66.4

* Data from publicly filed Permanent Capitalization plans, and amendments.

** US West data does not include Advanced Paging Services, Inc., a company owned by Northwestern Bell Telephone Company, which in turn is owned by US West. Advanced Paging Services, Inc. offers paging services and associated CPE.

Table 2

Telephone Investment and Construction

RBOC	*(1) Total telephone investment* June 30, '84 ($ millions)*	*(2) Net telephone investment** June 30, '84 ($ millions)*	*(3) Projected 1984 Construction *** ($ millions)*	*(4) Jan. - June actual Construction # ($ millions)*
Ameritech	18,885	14,491	1,694	658
Bell Atlantic	19,655	15,104	1,715	727
BellSouth	24,229	19,562	2,374	1,023
NYNEX	20,941	15,575	2,002	831
Pacific Telesis	18,315	14,820	2,189	811
Southwestern##	18,056	14,907	1,813	731
US West##	17,896	14,047	1,837	703

* Total telephone plant in service: Management Report-1 (MR-1) sheet 2, line 1

** Total telephone plant in service less total reserves for depreciation and amortization: MR-1, sheet 2, line 3

*** November 8, 1983 Prospectus issued to shareholders

# Year to date construction: MR-1, sheet 2, line 38

## Southwestern now presents MR data in a slightly different format. US West data does not include Malheur Telephone Co.

Table 3

Estimated Funds Generated from Telephone Operations Jan 1984 - June 1984 (differences in totals due to rounding)*

RBOC	*(1)* *Net income*** *($ millions)*	*(2)* *Depreciation & Amortization**** *($ millions)*	*(3)* *Deferred Taxes & Tax Credits #* *($ millions)*	*(4)* *Estimated from Total (1)+(2)+(3)* *($ millions)*	*(5)* *Prospectus## divided by 2* *($ millions)*
Ameritech	538	658	114	1,311	1,314
Bell Atlantic	504	580	168	1,253	1,257
BellSouth	587	745	165	1,498	1,570
NYNEX	450	577	121	1,149	1,221
Pacific Telesis	367	560	209	1,137	1,162
Southwestern ###	418	547	194	1,160	1,212
US West ###	405	541	170	1,117	1,202

* The principal elements of internally generated funds are Net income; Depreciation & Amortization (which are non-cash items that were included as expenses); and Deferred taxes & tax credits. Less significant items not included are deferred state income taxes in some states and amortization of discounts on long term debt. (MR-3, line 40 less line 41) These estimates are close to half the whole year estimates in the Prospectus shown in Column (5). Working capital, the difference between current assets and current liabilities, appears on financial statements as a source or use of funds, but was not included for this analysis.

** Net Income (MR-1, line 22) minus Interest earned on construction (MR-3, line 24: Account 313-02)

*** MR-1, line 9

revenues collected for federal operating taxes and included as expenses at statutory rates (MR-1, line 22) minus federal taxes actually booked (MR-3, line 7: Account 306)

Funds from Operations including Dividends

Southwestern now presents MR data in a slightly different format. US West data does not inlcude Malheur Telephone Co.

Table 4

Estimated cash availability and Principal uses Jan. - June 1984

RBOC	*(1)* *estimated cash from telephone operations** *($ millions)*	*(2)* *telephone construction through June* **** *($ millions)*	*(3)* *declared dividends through June* ***** *($ millions)*	*(4)* *cash available for other uses (1)-(2)-(3)* *($ millions)*
Ameritech	1,311	658	292	361
Bell Atlantic	1,253	735	311	207

BellSouth	1,498	1,023	278	197
NYNEX	1,149	831	293	26
Pacific Telesis	1,137	811	262	64
Southwestern	1,160	731	272	157
US West	1,117	703	258	156

* Estimate of internally generated cash taken from table 3, Construction data taken from table 2. This was calculated as net income from telephone subsidiaries plus depreciation plus federal tax benefits minus Interest earned During Construction.

** Year to date construction: MR–1, Sheet 2, line 38

*** RBOC SEC Form 10 Q filings for June 30, 1984

Table 5

Changes in RBOC Debt & Equity Capital through June 1984

RBOC	*(1) RBOC Increase/ (decreases) in short term debt* ($ millions)*	*(2) RBOC Increase/ (decreases) in long term debt* ($ millions)*	*(3) RBOC Increase in paid in Capital* ($ millions)*	*(4) RBOC Increase in retained earnings** ($ millions)*
Ameritech	33	(133)	73.0	230
Bell Atlantic	(235)	(133)	74.8	171
BellSouth	261	145	90.8	290
NYNEX	(136)	–	94.3	169
Pacific Telesis	16	(2)	60.8	146
Southwestern	182	–	48.6	146
US West	233	266	***	148

* From Sources of Funds statements contained in SEC Form 10 Q filings.

** From Balance Sheets contained in SEC Form 10 Q filings.

*** Through June 30, 1984, US West purchased more shares as a result of its offer to purchase small holdings than it sold through dividend reinvestment and savings plans. Much of these repurchased shares have now been resold. Therefore, $121 Million understates the amount of long term debt that US West could incur without increasing its debt structure. See notes to US West 10 Q reports.

Table 6

Capitalization as a percentage of equity

RBOC	*(1) total capitalization request ($ millions)*	*(2) total shareholder equity* ($ millions)*	*(3) shareholder telephone equity** ($ millions)*	*(4) (1) – (2) (%)*
Ameritech	83.6***	6,946	6,666	1.2
Bell Atlantic	356.0	7,249	7,136	4.9

BellSouth	363.6	8,951	8,510	4.1
NYNEX	151.9	7,484	6,825	2.0
Pacific Telesis	87.6	6,317	6,261	1.4
Southwestern	47.7	6,682	6,558	.7
US West	66.4***	6,400	6,099	1.0

* From SEC Form 10 Q filings for June 30, 1984. This includes RBOC investments in subsidiaries in addition to telephone companies. For several RBOCS, much of the assets of some unregulated subsidiaries are devoted primarily to supporting telephone operations.

** Paid in capital and retained earnings for Telephone Subsidiaries as of June 30, 1984. (MR-1, sheet 2, line 18) MR data is computed on a different basis than does SEC Form Q data. Southwestern now presents MR data in a slightly different format. US West data does not include Malheur Telephone Co.

*** The staff is aware that US West and Ameritech plan to invest capital in US West Services, Inc. and Ameritech Communications, Inc., respectively, to support those companies' CPE operations but those figures have not been included in this table since capitalization plans have not been filed for these companies.

Cut-off Rules

The cut-off date of a low power television or television translator construction permit application is properly conferred on all directly or indirectly mutually exclusive low power television or television translator applications filed at any time before the cut-off date.
—*Bill R. Wright*

FCC 85-610

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of

BILL R. WRIGHT

For a Construction Permit for a New Low Power Television Station on Channel 47, Greenville, Texas

File No.
BPTTL-820617QE

MEMORANDUM OPINION AND ORDER

Adopted: November 14, 1985; Released: November 22, 1985

BY THE COMMISSION:

1. The Commission has under consideration an Application for Review filed by Jack W. Butler ("Butler"), which seeks review of a Mass Media Bureau ("Bureau") action dismissing Butler's petition to deny the above-captioned low power television construction permit application of Bill R. Wright ("Wright").[1]

2. Wright's application for Channel 47, Greenville, Texas, was tendered on June 17, 1982. Butler claims that he is a prospective applicant for Channel 47 in Greenville, and was waiting for public notice of a cut-off date for the Wright application so that he could file his competing appplication.[2] However, on January 17, 1983,

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[1] Wright's application was granted on July 27, 1984, and assigned call sign K47AP.

[2] Butler never filed an application for Channel 47, Greenville, Texas, at any time.

the Commission gave public notice of a cut-off date for the earlier filed low power television application of Clearvision Communications ("Clearvision") for Channel 30, Lufkin, Texas (File No. BPTTL-820118TI).[3] That public notice stated:

> An application, in order to be considered with any application appearing on the attached list *or with any other application on file by the close of business on February 18, 1983*, which involves a conflict necessitating a hearing with any application on this list, must be . . . tendered for filing . . . not later than the close of business on February 18, 1983. [Emphasis supplied]

3. After the cut-off date of February 18, 1983, had passed, the Bureau found the following applications were timely filed and directly or indirectly mutually exclusive with Clearvision's Channel 30, Lufkin application:

BPTTL-830217UL	Lufkin, Texas	Channel 45
BPTTL-821206TO	Lufkin, Texas	Channel 46
BPTTL-821222TE	Lufkin, Texas	Channel 47
BPTTL-820617Q3	Nacogdoches, Texas	Channel 47
BPTTL-821221TU	Kerens, Texas	Channel 47
BPTTL-820617QE	Greenville, Texas	Channel 47

The Wright application for Channel 47, Greenville, Texas, thus was found to be indirectly mutually exclusive with the Clearvision application for Channel 30 in Lufkin through this "daisy chain" of directly and indirectly mutually exclusive applications.[4] Consequently, all these applications, including Wright's, were accorded the cut-off date of February 18, 1983, and applications directly mutually exclusive with any application in the chain could no longer be accepted for filing.

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[3] The cut-off list procedure, which accepts for filing listed applications by public notice and provides a final thirty day period for filing competing applications, has since been abandoned in the low power television service. The new procedure, the filing window procedure, provides that applications may be tendered only during a period announced by public notice. *Low Power Television Service (Filing Windows)*, 57 RR 2d 234 (1984).

[4] Daisy chains, which are common is low power television and television translator application processing, are so termed because applications tendered in response to a cut-off list can serve to link together a large number of applications that are not themselves directly mutually exclusive with the lead cut-off application, thus forming long and complicated chains of applications. In many cases, as here, chains link applications that were not themselves tendered in response to any cut-off list but became indirectly mutually exclusive with the lead cut-off application. In this case, for example, the application for Channel 45, Lufkin, Texas, was directly mutually exclusive with the lead Clearvision application for Channel 30, Lufkin, due to the 15 channel separation interference standard; the Channel 46, Lufkin, application was directly mutually exclusive with the Channel 45, Lufkin, application due to first adjacent channel prohibitions; the Channel 47, Lufkin, application was directly mutually exclusive with the Channel 46, Lufkin, application due to first adjacent channel prohibitions; the predicted contour of the Channel 47, Lufkin, application directly overlapped the predicted contour of the Channel 47, Nacogdoches, application, which itself directly overlapped the predicted contour of the Channel 47, Kerens, application. The predicted contour of the Kerens applica-

4. Upon becoming aware of their inclusion in the cut-off daisy chain, Wright and the Kerens, Texas, applicant amended their applications to designate operation on different frequency offsets, removing thereby the mutual exclusivity between Wright and the chain.[5] Since Wright's amended application was cut-off and was not directly or indirectly mutually exclusive with any other application, its grant was proposed.[6]

5. Butler filed a petition to deny the grant of Wright's application. He claimed that as a prospective applicant for Channel 47 in Greenville, Texas, his *Ashbacker* rights[7] were violated by the proposal for grant of Wright's application without it ever having been accepted for filing by explicit public notice, with the attendant thirty day period for the tendering of competing applications. The Bureau dismissed Butler's petition as defective because as a prospective applicant he had no standing to file a petition to deny Wright's application. The Bureau considered Butler's pleading informally and found that *Ashbacker* is not violated by the assignment of the cut-off date of the lead application in a chain to all applications then found to be in the chain, even if the chain is later broken by the dismissal or amendment of applications. The Bureau noted that both the Commission's holding in *Kittyhawk Broadcasting Corporation*[8] and Commission *Public Notice* cut-off lists warned prospective applicants to file their applications if they would be mutually

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tion directly overlapped the predicted contour of the co-channel Wright application. Consequently, the Wright application was indirectly linked to the lead Channel 30, Lufkin, application through this chain, and could not have been processed independently of the chain without prejudicing some, if not all, of the applicants in the chain.

[5] Frequency offset operation permits a less restrictive desired-to-undesired interference ratio between co-channel stations, thus allowing a greater number of stations to operate on the same channel. An application can propose operation with a plus, minus, or zero frequency offset designation, or propose operation without a frequency offset designation. For more detailed discussion, *see Citizen Television Corporation*, 100 FCC 2d 170, 171 n.1 (1985).

[6] *Public Notice*, Mimeo No. 2478, released February 21, 1984.

[7] *Ashbacker Radio Corporation vs. FCC*, 326 U.S. 327 (1945), provides that applicants whose proposals are mutually exclusive, as defined by Commission rules, are entitled to comparative consideration of their applications.

[8] *Kittyhawk Broadcasting Corporation*, 7 FCC 2d 153 (1967), *recon. denied*, 10 FCC 2d 160 (1967), *appeal dismissed sub nom. Cook, Inc. v. U.S.*, 394 F.2d 84 (7th Cir. 1968).

exclusive with the cut-off application, an application filed in response to the cut-off list, or with any other application on file which would itself be mutually exclusive with the lead application after the cut-off date.

6. Butler maintains in his application for review that he intended, and still intends, to submit a low power television application for the same channel and community as the Wright application. He thus implies that he has standing to petition to deny the grant of the Wright application because he is a prospective mutually exclusive applicant. Butler also reiterates his claim that he has been deprived unfairly of the opportunity to submit a competing application because the Wright application was cut-off without public notice, and should not have retained its cut-off status after its mutual exclusivity with the Clearvision application daisy chain was cured by amendment.

7. Generally, prospective applicants have no standing to file petitions to deny; the mere intention to file an application is not sufficient to confer the status of a party in interest. *See RKO General, Inc. (WNAC-TV)*, 89 FCC 2d 297, 310 (1982). However, since the crux of Butler's complaint in this case is whether he was deprived unfairly of the opportunity to file an application by the manner in which the Bureau processed Wright's application, we will consider his pleading on the merits.

8. Butler argues that the conferral to cut-off protection without public notice on Wright's application and its retention of cut-off status after the mutual exclusivity was resolved with the Kerens, Texas, applicant improperly prevented Butler from filing a competing application. However, this argument is based on Butler's mistaken assumption that a competing application could have been tendered only during the thirty day period after explicit public notice had been issued accepting Wright's application for filing and assigning it a cut-off date. As Butler acknowledges, Wright's application was not tendered in response to any cut-off list. This is due to the fact that Wright did not need to wait for a cut-off list to file his application under then-existing Commission rules. Wright's antenna site is more than 55 air miles from any of the 212 FCC-ranked television markets. Consequently, his application was properly tendered and potentially acceptable for filing as a 'Tier I' application, exempt from the partial freeze on the tendering of low power television and television translator applications then in effect.[9] *See* Appen-

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[9] We note that, of the five applications which formed the chain that linked the lead cut-off application and Wright's proposal, only one (the Channel 45,

dix E to *Low Power Television Report and Order*, 51 RR 2d 476 (1982); *Reconsideration of Low Power Television Report and Order*, 53 RR 2d 1267, 1276 (1983).[10] As a result, Butler could have tendered a competing application for Channel 47, Greenville, Texas, *at any time* before Wright's application was cut-off, a period of eight months, but did not do so.[11]

9. Butler also protests that we never afforded notice to the public that this method of conferring the cut-off date of an application cut-off by public notice on all timely filed applications with which it is directly or indirectly mutually exclusive would be used in the low power television service until after the Wright application was cut-off.[12] However, this procedure has always been used in broadcast services where channels are unallocated and licensing is done on a non-interference basis, and is inapplicable only in the full service television and commerical FM radio services, where allocation tables virtually eliminate the possibility of daisy chain situations. *Sterling Recreation Organization Company*, 80 FCC 2d 319 (1980). As the Bureau correctly stated, prospective applicants have long been on notice that under our cut-off procedures they could be barred from filing applications due to the tendering of unlisted applications which directly or indirectly interlink with listed cut-off applications. *See Kittyhawk, supra*; *see also Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961). Moreover, the language of the public notice which established the cut-off date for the lead application in the chain with which Wright's application linked plainly detailed this procedure. *See* para. 2, *supra*. Therefore, Butler had adequate notice at the time Wright's application was cut-off that his application could be precluded by timely filed, linking proposals. *Ranger v. FCC, supra*; *see also Ridge Radio Corporation v. FCC*, 292 F.2d 770 (D.C. Cir. 1961).

Lufkin, application) was tendered during the final thirty day public notice period. Wright's application was tendered in June 1982; the rest were tendered between June and December 1982.

[10] A complete freeze on the tendering of low power television and television translator applications was later instituted. *Order Imposing Freeze*, FCC 83-423, released September 19, 1983.

[11] Wright's application was tendered on June 17, 1982, and cut-off on February 17, 1983 — a period of eight months. Butler could have filed an application before Wright as well.

[12] We specifically noted the use of this procedure in *Second Lottery Report and Order*, 93 FCC 2d 952, 962 n.10 (1983), and issued a *Public Notice*, "Television Translator/Low Power Television: Clarification of Assignment of "A" Cut-off Dates," Mimeo No. 223, released October 17, 1983, further illustrating its use in the low power television and television translator service.

10. In light of this situation, it is clear that Butler did not file an application to compete with Wright's because he did not take account of the workings of the cut-off rule — specifically, the procedure by which the cut-off date of one application is conferred on all applications with which it is directly or indirectly mutually exclusive. This procedure is entirely consistent with *Ashbacker, supra*, and its propriety has been noted by the Court of Appeals for the District of Columbia Circuit and by this Commission on a number of occasions over the past quarter-century. *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir, 1963); *Ranger v. FCC, supra*; *Bronco Broadcasting Company, Inc.*, 58 FCC 2d 909, 911 (1976); *Kittyhawk*, supra. We have consistently applied this procedure in the low power television and television translator service, and gave all prospective applicants, including Butler, public notice that their proposals could be precluded by the interlinking of unlisted applications which those appearing on a cut-off list. *See* paras. 2 and 9, *supra*. By ignoring or failing to understand the cut-off rules, Butler assumed the risk that he would be prevented from filing a competing application for Channel 47, Greenville, Texas. Therefore, he cannot be heard to complain about lack of notice. *See Ranger v. FCC, supra*; *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir. 1976).

11. Butler urges us to put Wright's application on an "A" cut-off list so that competing applications might be filed. He thus suggests that post-cut-off amendments between mutually exclusive applicants should result in the loss of cut-off protection for an applicant that resolves its mutual exclusivity and breaks free of the daisy chain, as Wright did in this case. However, our cut-off procedures allow applications to be processed to a conclusion without interruption and the necessity of reprocessing because of new filings and amendments to pending applications. *See, e.g., United Public Broadcasting Company, Inc.* 57 RR 2d 1605, 1606 (1985); *Amendment of Sections 1.106(b), 1.354 and 1.361(b) of the Commission's Rules*, 18 RR 1565 (1959), *recon. denied*, 18 RR 1568 (1959). Consequently, we have indicated that an application retains its cut-off status even if the mutual exclusivity is cured after the cut-off date through amendment or through dismissal of the linking application(s). *United Public Broadcasting Company, Inc.*, 57 RR 2d at 1605, n.1; *Artlite Broadcasting Company (KEYH)*, FCC 84-532, released November 13, 1984; *see also Vand Broadcasting Service*, FCC 85-267, released May 21, 1985.

12. To strip properly cut-off applicants of their protection in this manner would render the cut-off procedure nugatory by necessitating the constant invalidation and revision of the cut-off dates of acceptable and potentially grantable applications. The resultant reprocessing of applications would have a particularly devastating impact in the low power television and television translator service due to the large number of pending applications (approximately 20,000 at present), most of which are directly or indirectly mutually exclusive with many others. As we have stated in other contexts, reprocessing would substantially impede the licensing process and the provision of low power television and television translator service to the public. *See, e.g.*, *Howard LP Television, Inc.*, 100 FCC 2d 1391 (1985); *Citizen Television Corporation, supra*.

13. More importantly, elimination of cut-off protection for applicants which cure their mutually exclusive situations by amendment would discourage settlements between applicants to resolve interference conflicts. These applicants would lose any incentive to break the chain, as amendments would not longer result in grant of their applications or increase their chances to prevail in a lottery. If the resolution of mutual exclusivity by amendment resulted in the loss of cut-off protection, applicants would remain in the daisy chain and retain their cut-off status rather than open themselves up to competing applicants for a second time. Also, substantial prejudice to applications would occur in situations where the mutual exclusivity between that applicant and the chain was resolved by an amendment to another application. Again, this would have an especially great impact in the low power television and television translator service, where application daisy chains tend to be particularly large and complex. It is not unusual for chains of hundreds of mutually exclusive applications to be identified in this service, and in one instance, a daisy chain of more than 4,000 applications was discovered during initial analysis by the Bureau. Unless applicants are able to resolve their interference conflicts among themselves, many large chains would literally take years to be processed completely.

14. Our low power television and television translator application processing procedures strike a reasonable balance between the rights of applicants and potential applicants, and take into account the public's interest in the expeditious provision of new service. Alternative methods of processing would very likely delay action on applications and the resultant provision of service. The

withdrawal of cut-off protection from applications when their mutual exclusivity is cured after the cut-off date is clearly not in the public interest, since it would unfairly prejudice applicants by forcing their proposals to become reexposed to competing applications and impede greatly the institution of low power television and television translator service. Consequently, we are constrained to adhere to our processing procedures.[13] However, we again stress that potential applicants like Butler were not without the opportunity to protect their interests by the prompt filing of their applications. *See*, *e.g.*, paras. 8–10, *supra*.

15. The factual and legal arguments set forth in Butler's pleading do not warrant changing the Bureau's decision. Consequently, Butler's application for review will be denied.

16. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the Application for Review filed by Jack W. Butler IS DENIED.

17. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail-Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[13] Our procedures are now even more equitable since the adoption of the filing window approach. *See* note 3, *supra*.

Billing Practices
Deregulation
Tariff
Telephone Disconnection

Report and Order adopted detariffing interstate billing and collection services and continuing the Commission's deferral to state regulatory authorities with respect to the practice of disconnecting a subscriber's local telephone service for nonpayment of interstate toll charges.

— _Billing/Collection Services_

CC Docket 85-88

FCC 86-31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Detariffing of Billing and Collection Services	CC Docket No. 85-88

REPORT AND ORDER

Adopted: January 14, 1985; Released: January 29, 1986

BY THE COMMISSION:

TABLE OF CONTENTS

		Para.
I.	Introduction	1
II.	Background	2-8
III.	Summary of Comments	9-29
	A. Jurisdiction	9-11
	B. Competition	12-14
	C. Recording	15-17
	D. Transition Period	18
	E. Separations	19

F. Separate Subsidiary 20–21

G. Separate Accounting 22–25

H. Local Cut-offs 26–29

IV. DISCUSSION 30–54

A. Title II Jurisdiction 30–34

B. Title I Jurisdiction 35–38

C. Transition Period 39–44

D. Recording 45–47

E. Separations 48

F. Separate Subsidiary and Separate Accounting Requirements 49–50

G. Local Cut-offs 51–52

V. Conclusion 53

VI. Ordering Clauses 54–59

I. INTRODUCTION

1. On April 9, 1985, we released a Notice of Proposed Rulemaking[1] proposing to detariff billing and collection services.[2] In this Report and Order we adopt the conclusion tentatively reached in the *Notice* that billing and collection services "are not communications common carriage within" Title II of the Communications Act, 47 U.S.C. §§ 201 *et seq*. We are, therefore, amending the Part 69 access charge rules to delete the Billing and Collection element. We are also requiring that LECs file tariff revisions removing provisions for interstate billing and collection from their access tariffs on 35 days' notice to be effective January 1, 1987. We are, however, imposing a requirement that the recording function must continue to be offered through 1989. We conclude that a separate subsidiary requirement is not warranted; that detariffing can proceed independently of any changes in the jurisdictional separation of carriers' costs and revenues; and that

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[1] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 100 FCC 2d 607 (1985) (*Notice*).

[2] Billing and collection, in this context, refers to a service provided by a local exchange carrier (LEC) to an interexchange carrier (IC) whereby the former bills and collects from end users for services provided to end users by the IC. More specifically, this service includes recording IC message detail, aggregating the details to create individual messages, (a completed call originated by an IC's end user), applying the IC's rates to such messages, processing these rated messages into customer invoice form, mailing bills, collecting payments, accepting customer deposits, handling customer inquiries and investigating billing evasion activities.

this Commision should continue to defer to state regulatory authorities with respect to permitting local service disconnections for nonpayment of interstate toll charges.

II. BACKGROUND

2. This Commission had no occasion to consider the regulatory status of billing and collection for interstate services by local exchange carriers prior to the adoption of the *Modification of Final Judgment (MFJ)*[3] that mandated divestiture of Bell System local exchange operations. Both the Bell Operating Companies (BOCs) and the independent telephone companies had participated in joint rate interstate offerings with the American Telephone and Telegraph Company (AT&T). Therefore, the local exchange carriers (LECs) were billing and collecting for their own offering when they billed end users for AT&T services. Billing and collection for a carrier's own communications offering is an incidental part of the provision of a communication service and such expenses are unquestionably attributable to that regulated activity. The exchange carriers did not offer any billing and collection for interexchange competitors of AT&T who were not a part of the "partnership" and there was no reason to consider whether such a service for an unaffiliated carrier would be common carrier communications service.[4]

3. The *MFJ* not only required divestiture of Bell System local exchange operations, but also required the dissolution of the partnership arrangements among the Bell System companies. The dissolution of the partnership changed the nature of any billing and collection functions that exchange carriers might perform for AT&T after the divestiture. Such billing and collection would not be incidental to any service offered by the local exchange carrier, but would be a service offered to another carrier.

4. The *MFJ* did not preclude the divested BOCs from continuing to provide billing and collection for AT&T. Section C.2 of Appendix B provided:[5]

> Nothing in this Modification of Final Judgment shall either require a BOC to bill customers for the interexchange services of any interexchange carrier or preclude a BOC from billing its customers for the interexchange

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[3] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[4] The comments of MTN, NWB and PNB do note, however, that those companies had provided billing and collection services to Western Union by contract for decades. This Commission apparently did not conduct any inquiries to determine whether the contract charges, terms or conditions were reasonable.

[5] 552 F. Supp. at 234.

> services of any interexchange carrier it designates, provided that when a BOC does provide billing services to an interexchange carrier, the BOC may not discontinue local exchange service to any customer because of nonpayment of interexchange carriers unless it offers to provide billing services to all interexchange carriers, and provided further that the BOC's cost of any such billing shall be included in its tariffed access charges to that interexchange carrier.

5. When we adopted the Part 69 access charge rules, it seemed likely that BOCs and other exchange carriers would perform billing and collection for AT&T after divestiture because most of the Bell System's billing capabilities would remain with the BOCs. We accordingly decided to establish a separate access charge element for billing and collection that an exchange carrier performs for an interexchange carrier (IC) and decreed that "an exchange carrier offering billing and collection or billing information services to one interexchange carrier must offer them to all."[6]

6. Our subsequent experience in reviewing the complex billing and collection provisions in the initial access charge tariffs led us to conclude that we should reexamine the implicit assumption that carrier billing and collection for another carrier is a service that must or can be regulated under Title II of the Communications Act. We accordingly announced our conclusion that a proceeding should be instituted to examine the possibility of detariffing billing and collection services.[7] The April 9, 1985 *Notice* instituted that proceeding.

7. In that *Notice* we tentatively concluded that billing and collection is not a communications service *per se* that is subject to regulation under Title II and that it is not inherently part of a LEC's bottleneck monopoly since it can be performed by the IC itself or obtained from competing vendors. The *Notice* observed, however, that these conclusions may not apply with equal force to the recording function[8] because it is performed as a function of

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[6] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, at para. 244. (1983) (*Access Charge Order*). *See also* Section 69.114(a) of the Commission's Rules, 47 C.F.R. § 69.114(a). Although the Commission did not initially specify a rate of return for billing and collection services in the access rules, the level of the proposed charges led us to require that billing and collection charges be set at no higher than a 12.75 percent return. *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, and MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 49 Fed. Reg. 23924 (June 8, 1984), at para. 83.

[7] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1285, (1984) (*February 17 Order*).

[8] According to the access tariffs, recording is the entering on magnetic tape or other acceptable medium of the details of IC messages originating through Switched Access Service. The assembly and editing function then identifies the message details for a particular IC, aggregates the details to create individual

network switching operations. We, therefore, proposed to keep the recording function under tariff indefinitely. As to the mechanics of detariffing other billing and collection functions, the *Notice* solicited comment on whether separate accounting or a separate subsidiary requirement should be imposed. The *Notice* also proposed to make detariffing permissive initially but mandatory at a later date. The *Notice* also discussed the possibility that, even after a carrier withdrew its tariff, there might be residual regulation through the Section 208 complaint process. *See* 47 U.S.C. § 208. To the extent that any separations changes are necessitated by detariffing, the *Notice* instructed interested parties to file comments in conjunction with the Federal-State Joint Board proceeding concerning permanent allocation procedures for Account 645, Local Commercial expenses.[9]

8. Although local cut-off service, *i.e.*, termination of local exchange service for nonpayment of interstate toll charges, may present issues that are independent of detariffing, these issues have become intertwined with this proceeding because local cut-off service was initially offered in the LECs' billing and collection tariffs.[10] In the *February 17 Order* this Commission questioned the reasonableness of this practice. The practice could give LECs an unfair competitive advantage in the market for billing and collection services, and it may be unfair to end users to have their local telephone service placed in jeopardy by a LEC acting in its capacity as billing agent or holder of IC receivables. This Commission recognized, however, that there may be technical limitations inherent in certain types of switching systems making separate screening and blocking of interstate toll calls difficult or impossible in some end offices.[11] Therefore, we temporarily

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messages and verifies that the data required for rating are present.

[9] Recommended Interim Order and Request for Comments, CC Docket Nos. 78-72 and 80-286, Mimeo No. 3400, released Mar. 25, 1985 (*Recommended Interim Order*); Recommended Decision and Order, CC Docket Nos. 78-72 and 80-286, FCC No. 85-611, released Nov. 15, 1985 (*Recommended Decision and Order*); Decision and Order, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 86-5, released Jan. 7, 1986 (*Decision and Order*). Account 645, Local Commercial Operations, reflects costs associated with billing inquiry service.

[10] The tariffing of local cut-off service emanates from the MFJ which states that a "BOC may not discontinue local exchange service to any customer because of nonpayment of interexchange charges unless it offers to provide billing services to all interexchange carriers." 552 F. Supp. at 234 (Appendix B(C)(2)).

[11] *See February 17 Order*, 97 FCC 2d at 1289; Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, FCC 84-188, released Apr. 27, 1984, at 8-2; Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Mimeo No. 4246, released May 16, 1984, at para. 3 (*Waiver Order*).

allowed local cut-offs permitted by state authority while we further reviewed the technical aspects of telephone service disconnections. We also required carriers to delete any references to local cut-offs from their interstate tariffs.[12] The *Notice* in this proceeding solicited comment on whether this temporary approach should be adopted on a permanent basis or whether there is a federal interest in imposing a nationwide prohibition of local cut-offs.

III. SUMMARY OF COMMENTS

A. Jurisdiction

9. While many commenters[13] focus on the extent to which billing and collection is a competitive service, several BOCs contend that the issue of primary importance in this proceeding is not whether billing and collection may be deregulated, but whether it may be regulated at all under Title II of the Act. MTN, NWB and PNB assert that Title II empowers this Commission to regulate interstate communications offered on a common carrier basis[14] and that the terms "communications" and "common carrier" have a coherent legal meaning and are "sufficiently definite so as not to admit of agency discretion in the classification of operating communications entities."[15] In order for a service to constitute communications common carriage, according to MTN, NWB and PNB, it must meet three criteria: it must be (1) a communications service; (2) for hire; (3) offered to the public on an indiscriminate basis.[16] They argue that third-party billing and collection fails to meet two of these criteria inasmuch

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[12] *Waiver Order* at paras. 4–5.

[13] A list of the parties which have filed comments and reply comments in response to the *Notice* is attached as Appendix A.

[14] MTN, NWB and PNB cite Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984), for the proposition that communications services not offered on a common carrier basis may not be regulated under Title II. They also note that in National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*), the court affirmed the Commission's decision that operators of Specialized Mobile Radio Systems, though providing communications services, are not common carriers and therefore are not subject to regulation under Title II.

[15] MTN, NWB and PNB cite *NARUC I*, 525 F.2d at 644.

[16] MTN, NWB and PNB cite Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services, 89 FCC 2d 766, 776–77 & n.27 (1982), *on recon.*, 93 FCC 2d 1127 (1983) (*Multiple PLMRS Licensing*). They also note that under *NARUC I* all three criteria must be present in order for the service to be subject to regulation.

as it is not a communications service *per se*[17] and is not imbued with a quasi-public character which causes third-party vendors to provide such services to all ICs indifferently. Moreover, they state that the fact that other billing and Collection vendors are not regulated is strong evidence that this service is not a common carrier activity.[18] USTA asserts that an additional factor supporting the position that billing and collection is not an appropriate subject for Title II regulation is that a rate of return applies to investment and LEC investment associated with billing and collection is a minimal part of the cost of performing this service.

10. Notwithstanding the Title II question, Dial USA argues that the Commission has a legal obligation under the *MFJ* to continue regulating billing and collection.[19] Centel, however, questions whether the *MFJ* can override a Commission determination that tariffing is inappropriate because billing and collection is not a communications service subject to Title II of the Act.[20] Indeed, MTN, NWB and PNB observe that common carrier-type obligations were imposed on billing and collection because of the existence of tariffs rather than the normal process of first determining that a particular service constitutes a common carrier activity and therefore requiring that tariffs be filed.

11. Finally, MTN, NWB and PNB contend that, if billing and collection service is to be regulated at all, it must be regulated under the Commission's Title I ancillary authority. They note, however, that the exercise of such jurisdiction would require a record finding of need.

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[17] CWA disagrees with claims that billing and collection is not a communications service *per se* and asserts it is a necessary adjunct to the provision of communications service. In addition, CWA argues that billing and collection is by its nature a monopoly service since the LEC is uniquely in possession of the basic pieces which include the list of customers, their addresses, and their usage of LEC facilities.

[18] MTN, NWB and PNB cite the Second Computer Inquiry, 77 FCC 2d 384, 435-47 (1980) (Final Decision) in support of this statement. They also contend that when only some of the entities providing a service are subject to common carrier regulation, these entities are placed at a severe competitive disadvantage *visa-a-vis* those entities providing the service on an unregulated basis.

[19] Dial USA states that it is well established that "regulation under the Communications Act is neither sufficiently explicit nor sufficiently pervasive to allow it to stand in the way of the enforcement of the antitrust laws." Dial USA Comments at n.2, quoting United States v. AT&T, 552 F. Supp. at 157.

[20] Centel also notes that the Commission need not address this question to relieve non-BOCs of this tariff obligation.

B. Competition

12. AT&T contends that while competition in the provision of billing and collection service is foreseeable, it does not yet exist. AT&T observes that since the Commission's decision to impose a rate of return constraint on billing and collection services there has been no material change in the availability of these services and that detariffing at this time could result in a recurrence of the excessive charges which led to that decision. AT&T states that it will encounter enormous practical difficulties developing and implementing a nationwide billing capability for its more than 90 million customers and that no other billing and collection vendor is able to provide adequate service for this customer base at the present time. NARUC and NYDPS concur in this point, the latter questioning whether even a consortium of such vendors would be in a position to perform this task. Becasue it is still largely dependent on LECs for billing and collection,[21] AT&T urges that if the Commission detariffs these services, it should also establish a transitional price and servic protection plan.[22] BellSouth replies that such a plan would be even more rigid than present regulation since carriers are able to file tariff revisions at any time in order to request rate changes, but would not have this ability under AT&T's proposal. NYNEX asserts that the need for a transition period prior to detariffing does not warrant the mandatory price and service guarantees suggested by AT&T. NYNEX states that all LECs currently have tariff provisions for providing billing service for a fixed period of time and that these commitments should continue to be honored after detariffing.

13. A number of LECs observe that AT&T has already begun taking over billing inquiry in many areas[23] and has indicated that it plans to begin performing its own billing service for WATS in

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[21] Dial USA notes that resellers also rely heavily on LECs to perform their billling.

[22] Specifically, AT&T states that such a plan should include an agreement on the part of the LECs to (1) continue to offer the billing and collection services previously provided under tariff, improving and supplementing them on reasonable request; (2) at rates no higher than existing rates; and (3) under the same terms and conditions set forth in the tariffs. AT&T does propose, however, that LECs be allowed to request rate increases based on evidence of increased costs.

[23] NYDPS suggests that AT&T's assumption of the billing inquiry function is not indicative of a competitive environment because it is limited to only a few states and because it is unique in that no on-site physical facilities are required to perform this function. Billing inquiry is essentially the handling of customer inquiries concerning their bills.

1986 and for its largest MTS customers in 1987. This, coupled with the fact that other ICs have never been dependent on LEC billing services, leads several commenters to conclude that the extent of competition will depend largely on the ability of ICs (including AT&T) to do their own billing.[24] BellSouth notes that sseveral ICs offer their large end users billing services such as breaking down invoices into sub-accounts by department, division, location or cost center. NTCA and OPATSCO state that they do not expect billing and collection services to be offered on a widespread basis by non-telecommunications entities because of the unique nature of billing and collection in the industry. The two associations add that they do expect the BOCs to engage in widespread efforts to capture the market.[25] Hence, they conclude that it remains to be seen whether significant competition will develop or whether a *de facto* oligopoly will arise.

14. Other commenters allege that competition from non-LEC billing and collection providers exists now and assert that the entry of companies such as VISA, Mastercard, American Express and Sears into the interexchange billing market provides evidence of this competition. BellSouth states that other billing entities entering the market are service bureaus which provide billing and collection services for resellers and providers of multi-tenant shared services. Several commenters contend that neither these alternative billing and collection providers nor the ICs themselves can match the economic advantages (*e. g.*, lower costs since the IC billing systems are integrated with local exchange billing systems) and technological advantages (*e. g.*, ability to offer local cut-offs) enjoyed by LECs and, therefore, significant competition does not and will not exist. In light of the efficiencies associated with LEC-provided billing and collection service, GTE cautions that until it can be demonstrated that competition would serve some beneficial purpose, the Commission must not pursue a policy of encouraging competition for competition's sake[26] and should allow

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[24] Ameritech disagrees with the view that a market does not become competitive until customers are capable of meeting their own requirements. On the contrary, Ameritech argues that decisions by large, well-financed companies not to supply themselves with certain inputs typically demonstrates the existence of a competitive market for such supplies. Moreover, Ameritech suggests that AT&T's claim that because no single supplier can meet all of its billing needs the market is uncompetitive is incorrect since AT&T's current billing needs can in fact be met by a variety of suppliers.

[25] BellSouth notes that Ameritech has already sought an MFJ waiver to permit it to provide billing service in BellSouth territory.

[26] GTE cites FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), for this proposition.

LECs to continue providing both interstate and intrastate billing services through the same system on a regulated basis.

C. Recording

15. A number of LECs take issue with the *Notice's* proposal to keep the recording function under tariff. They argue that recording should not be exempted from detariffing because most ICs perform their own recording and AT&T is presently deploying software in its No. 4ESS offices which will allow it to do the same. They conclude that these facts moot the Commission's concern that detariffing could lead to a wasteful duplication of facilities.[27]

16. Several BOCs state that AT&T has informed them that it plans to assume the recording function in all equal access offices during 1987.[28] According to AT&T, however, it will not be able to perform recording from these offices until the rest of its billing and collection system is activated. Even then, AT&T states, it will still be totally reliant on the LECs for recording from end offices that do not convert to equal access. Ameritech contends that no purpose is served by tariffing recording because Feature Groups A and B (FGA and FGB) do not capture call detail and thus recording is not needed for billing and collection purposes, and because under Feature Group D (FGD) the availability of Automatic Number Identification (ANI) will permit any IC to perform its own recording at minimal cost. As for Feature Group C (FGC), Ameritech suggests that AT&T can be protected by grandfathering existing arrangements.

17. Regardless of whether recording remains tariffed, several LECS urge the Commission to amend Part 69 because it overallocates investment and expenses associated with recording to the billing and collection rate element and thus prevents LECs from being able to offer AT&T an attractive price for this service. Specifically, NYNEX, Pacific and Contel request amendment of Section 69.306(e), 47 C.F.R. § 69.306(e), which allocates investment in Category 4 Central Office Equipment (which includes investment in recording equipment).[29] NYNEX contends that

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[27] *Notice* at para. 9.

[28] SWB states that this would constitute about 75 percent of AT&T's recording. It also notes that AT&T currently records all operator-handled calls.

[29] Category 4A represents recording equipment used for the duration of the call. Category 4B represents recording equipment used only momentarily to record information for the call. Investment associated with Category 4A is assigned to the billing and collection rate element and investment associated with Category 4B is equally divided between the billing and collection and local switching rate element.

investment in recording equipment should be totally assigned to the local switching rate element because recording is an integral part of switched access service (*i. e.*, recording equipment records the number of access minutes an IC uses and thus provides the basis for LEC billing of access charges) and there are virtually no additional costs caused by the use of recording equipment for IC billing purposes.[30] Pacific notes that the assignment of one-half of recording equipment costs to the billing and collection rate element could result in these costs being unrecovered if ICs do not purchase recording service. Both Pacific and Contel, therefore, propose to allocate Category 4B equipment on the basis of the relative number of interstate messages to total messages recorded. Contel proposes to allocate Category 4A equipment on the basis of the relative number of IC customer minutes to access minutes recorded.

D. Transition Period

18. The comments indicate four areas of concern in determining a reasonable implementation period. First, the BOCs assert that they must be given sufficient time to obtain waivers of the MFJ "requirement" that billing and collection services be tariffed. Second, a number of commenters express concern on behalf of smaller LECs, particularly those which currently participate in the NECA billing and collection pool, that these companies be given enough lead time to absorb a new function into their operations given the increased costs and administrative burdens they would face. NTCA and OPATSCO note that AT&T and other ICs would have to negotiate with several hundred individual LECs to obtain billing services in many areas. Several commenters suggest that a five year transition would be appropriate to this end. MTN, NWB and PNB respond, however, that such a long transition plan is not warranted because this Commission could confer explicit antitrust immunity on small LECs so as to enable them to negotiate with ICs as a single unit. Third, BellSouth states that the transition period should be either one or

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[30] NYNEX filed a waiver petition on April 23, 1985 requesting this same rule change. The request was denied, first, because granting it would have appeared to be prejudging the present rulemaking proceeding and, second, because AT&T's assertions as to its present recording capabilities indicated that a complete and immediate allocation of all recording costs to local switching would be premature and inappropriate for purposes of the 1985 access filing. *See* Petitions for Waiver Concerning 1985 Annual Access Tariff Filings, Mimeo No. 5007, released June 7, 1985, at paras. 38–40.

two years depending on whether a separate subsidiary requirement is imposed. Finally, several commenters contend that detariffing should not be mandatory until separations procedures regarding billing and collection are revised so as to reflect the actual costs of providing this service.

E. Separations

19. Several LECs contend that separations reform is needed prior to or should accompany detariffing because under current separations procedures the Account 645 and Account 662 costs allocated to the interstate billing and collection category exceed the costs of providing this service.[31] Consequently, these LECs argue that the present cost allocation scheme prevents the competitive pricing of billing and collection service.[32] Moreover, USTA asserts that making jurisdictional cost allocations on a fully distributed cost basis, as required by current procedures, greatly contributes to the LECs' inability to price billing and collection services competitively.[33] It contends that use of a marginal costing method would be more suitable for these allocations since billing and collection is a labor intensive service with significant economies of scale. USTA also notes that use of a marginal cost method would minimize the impact of IC termination of billing and collection services on LECs and their ratepayers since the costs to be spread over remaining services would be

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[31] As noted *supra* in para. 7, we directed interested parties to file comments concerning separations issues raised by detariffing in conjunction with the pending Joint Board proceeding. In the *Recommended Interim Order*, at para. 25, the Joint Board also stated that commenting parties should bear in mind the possibility of detariffing billing and collection. The Joint Board adopted recommendations concerning the allocation of Account 645 on October 11, 1985. *Recommended Decision and Order, supra* note 9. The Commission adopted these recommendations on January 3, 1985. *Decision and Order*, supra note 9. In the *Recommended Decision and Order* the Joint board stated that it will consider issues related to Account 662 at a later date.

[32] United states that AT&T's assumption of the billing inquiry function is clear evidence of misallocation given that the costs currently allocated to billing inquiry greatly exceed the LECs' direct or avoidable costs associated with performing that function.

[33] SWB states that a competitive analysis it recently undertook in response to a bid request from AT&T to provide billing services indicates that SWB's current prices, based on FDC methodology and present separations procedures, exceed the alternate cost of supply to AT&T if it were either to deploy its own billing system or to use another vendor. The analysis also reveals, according to SWB, that its direct cost to provide billing and collection service is below AT&T's alternate cost of supply. SWB also notes that the results of this analysis should be equally applicable to other ICs. It concludes that while the loss of such business would cause a small reduction in costs, it would substantially reduce SWB's revenues.

reduced. Finally, NYDPS claims that the separations effect of detariffing billing and collection would be an increase in intrastate rates since costs formerly borne by both jurisdictions would be allocated almost entirely to the intrastate jurisdiction. Contel responds that deregulation would not change the level of costs assigned to the intrastate jurisdiction.

F. Separate Subsidiary

20. Although a number of state public utility commission contend that only a separate subsidiary requirement can control cross-subsidization, most commenters oppose a separate subsidiary requirement. MTN, NWB and PNB assert that the BOCs do not have market power in the provision of billing and collection services. They state that indicia of market power include the ability to raise and lower prices indiscriminately, control of bottleneck facilities, and the ability to impede new entrants.[34] As evidence that the BOCs do not meet these criteria they note that billing and collection performed for ICs "is not inherently part of a local exchange carrier's bottleneck monopoly"[35] and that AT&T will soon enter the market as its own supplier.

21. Several other BOCs argue that the establishment of separate subsidiaries for billing and collection services would be inefficient since it would foreclose their ability to take advantage of the joint economies in sharing equipment and personnel with local billing operations. They assert that requiring the replication of existing facilities could make the cost of providing this service prohibitive or, at the very least, would result in increased rates to the IC.[36] Other billing and collection providers, according to these commenters, would not incur such additional costs since they would be able to integrate toll billing into their existing billing operations. Moreover, NYNEX asserts that if, rather than replicating systems and equipment, the separate subsidiary merely contracts with the LEC for capacity, structural separation will serve no purpose that a separate accounting mechanism cannot accomplish other than to oversee the contract. NARUC urges that the Commission leave any decision to require a separate subsidiary to the discretion of the states since the impact of any LEC

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[34] MTN, NWB and PNB cite Competitive Carrier Rulemaking, 85 FCC 2d 1, 20 (1980).

[35] *Notice* at para. 6.

[36] Several BOCs also note that a separate subsidiary requirement would mean that customers would no longer benefit from the convenience of receiving a single bill for both local and interexchange service.

misconduct in this area is likely to be on local ratepayers.[37] BellSouth, which operates in a nine-state area, responds that such a fragmented approach would cause administrative difficulties. NYNEX notes that it would introduce an unnecessary jurisdictional complexity. Finally, NATA cautions that, in any event, billing and collection must not be provided by the LEC subsidiary providing CPE and enhancing services since personnel marketing unregulated products and services should not have access to proprietary information concerning a customer's IC service.

G. Separate Accounting

22. A few commenters contend that separate accounting procedures would not adequately counteract the LECs' incentive to overallocate joint and common billing costs to the regulated intrastate jurisdiction. For example, NARUC questions whether state regulatory commissions would be able to audit the division of such joint costs to ensure that local revenue requirements are not improperly inflated. Similarly, ATU notes that, given the complex nature of the cost and expense allocations needed, the prevention of cross-subsidization would impose a severe burden on state regulatory authorities to examine these cost assignments. Most commenters, however, agree that cross-subsidization can be prevented through the maintenance of separate books of account.[38] Several LECs state that they would account for expenses associated with deregulated IC billing services in separate nonregulated accounts through an assignment/allocation-type plan. In recognition of the fact that virtually all investment relative to billing and collection activities is used for both intrastate and interstate billing activities, BellSouth, for example, proposes to keep investment on the regulated books of account and transfer the aplicable portion of carrying charges[39] on this investment to the nonregulated accounts as rent expense. These LECs further state that revenue derived from detariffed billing and collection activities would also be taken below the line in nonregulated revenue accounts.

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[37] Contel recommends that the decision to use a separate subsidiary or separate accounting records be left to the discretion of the individual LEC.

[38] Ameritech states that cross-subsidization can also be detected by comparing the rate of return earned by deregulated billing and collection services against the rate of return earned by other competitive entities providing this service.

[39] "Carrying charges" are expenses incidental to the ownership of an asset such as depreciation and taxes.

23. Several LECs maintain that Parts 67 and 69 are adequate to assure that detariffed billing and collection costs are not charged to regulated accounts. A number of LECs contend, however, that current Part 67 and 69 allocation procedures would not properly allocate costs to nonregulated billing and collection operations because the costs assigned would exceed the direct costs of providing these services. Similarly, they argue that the general guidelines adopted in CC Docket No. 81-893 are inappropriate because those guidelines require allocations to be made on a fully distributed cost basis.[40] GTE recommends that joint and common costs be allocated on the basis of market value because otherwise the unregulated operation, in pursuit of its profit-maximization objectives, will obtain the necessary goods and services from an outside supplier to the detriment of the regulated ratepayer.

24. Centel argues that investment associated with billing and collection should not be transferred to nonregulated accounts because of the sbustantial possibility that it will not be recovered given AT&T's stated intentions to implement its own billing systems. Centel alleges that since the capital plant used for IC billing and collection was acquired in conjunction with the provision of local telephone service, it is the ratepayers, and not the carrier's stockholders, which must bear the risk of under-recovery.[41] Transfer of capital investment to nonregulated accounts, Centel states, would transfer this risk to the stockholders.

25. Finally, AT&T asserts that the Commission should require that regulated access charges be billed and accounted for separately from unregulated charges for billing and collection. It notes that under current practice, both billing and collection and access charges are "netted out" of the revenues collected by the LEC on behalf of the IC, resulting in a single, lump sum payment. According to AT&T, this procedure makes it impossible to verify

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[40] In the Fifth Report and Order in CC Docket No. 81-893, 49 Fed. Reg. 46,378 (Nov. 26, 1984) (*Fifth Order*), the Commission stated that it would propose specific cost allocation procedures in a subsequent notice. Ameritech states that Docket 81-893 concerns only CPE and enhanced services and applies only to AT&T and the independents. Therefore, it alleges that any such cost allocation rules would not be legally effective as to billing and collection since there would not be proper notice under Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553.

[41] To the extent regulated ratepayers have contributed to the capital investment necessary to provide IC billing services, several state public service commissions state that they should continue to benefit from the revenues derived from these services.

the accuracy of either the billing and collection revenues or the access charges. BellSouth replies that the imposition of such a restrictive requirement would be inconsistent with deregulation and that LECs should be free to negotiate agreements for billing and collection services with ICs under terms and conditions applicable to other competitive, detariffed services.

H. Local Cut-Offs

26. The consensus among virtually all categories of commenters is that this Commission should defer permanently to state regulatory authorities with respect to local cut-offs because the issues raised by this practice are better suited to state resolution. Commenting parties state that these issues involve an analysis of local considerations such as access to emergency services, the technical ability of individual LECs selectively to limit access to an IC's network, and procedures in place to insure protection of ratepayers from arbitrary telephone company disconnection. AT&T, on the other hand, urges the adoption of a uniform national policy permitting local cut-offs.[42] United also urges this Commission to allow local cut-offs on a nationwide basis, but only with regard to nonpayment of charges to an IC with FGC access arragngements (*i.e.*, AT&T and LECs providing interstate corridor and intraLATA toll service). AT&T argues that there would be a dramatic increase in uncollectibles without local cut-offs.[43] Dial USA contends that a blanket prohibition on local cut-offs would add to the already growing phenomenon of "long distance hopping." whereby end users jump from one IC to another, leaving huge, unpaid bills in their wake. To the extent that the LEC purchases the IC's accounts receivable, NTCA and OPASTCO assert, prohibiting local cut-offs would be unfair to the LEC since the payment would be owed to the LEC itself.[44]

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[42] AT&T notes that since the *Waiver Order* was released in May 1984, no state has flatly prohibited local cut-offs, and every state commission that has specifically investigated the issue (California, Florida, Michigan, New York, Pennsylvania and Wisconsin) has affirmatively allowed it to continue. More specifically, Bell Atlantic states that the Pennsylvania Commission only allows local cut-offs if selective denial is not technically feasible. The California PUC states that it does not allow local cut-offs with respect to nonpayment of bills unrelated to telephone service. SWB asserts that state commissions in the five states it serves permit local cut-offs and complaints by customers whose service has been disconnected for nonpayment of toll charges are minimal.

[43] AT&T estimates that had local cut-offs not been in effect in 1984, its interstate uncollectible rate would have at least doubled to $1.158 billion, causing a 36 percent drop in net earnings.

[44] NTCA and OPASTCO also state that LECs that provide interstate, intraLATA

27. Commenters further argue that a blanket prohibition of local cut-offs would be arbitrary and unreasonable in light of the technical constraints that still exist. AT&T states that it will not be able to deny access to its network from equal access offices until the end of 1986 at the earliest and maybe without this ability from nonconverting end offices indefinitely since these offices are not capable of supplying ANI. The LECs' abilities to screen and block calls on a carrier-specific, total toll, interLATA-only, and interstate toll-only basis, according to numerous commenters, depends on the switching system in place at each end office. For example, AT&T states that step-by-step switches cannot separate intraLATA from interLATA traffic.[45] Common control electromechanical switches, such as the No. 5 Crossbar switching system, according to AT&T, are also limited in their ability to provide interLATA-only call denial. AT&T further notes that stored program control switches in equal access offices can block all interLATA calls, but not on a carrier-specific basis. In non-equal access offices, it states, these switches can block only AT&T's interLATA calls.

28. NYNEX states that carrier-specific denial may be possible for FGD service, but is not currently available. The ability to terminate interstate toll separately from intrastate toll service, according to several BOCs, currently exists for FGC and FGD service provided by certain electromechanical and stored program control switches. NYNEX notes, however, that interstate-only denial has limited utility, except in single-LATA states, because an IC which has not been paid by a customer could not be expected to extend credit to the customer for intrastate calling. Thus, it maintains, this denial mechanism would generally only be meaningful if a customer had different intrastate and interstate toll providers. Regardless of the limitations inherent in their switching systems, the LECs maintain that their current billing and administrative system (Customer Records Information System) cannot process partial payments for multiple balances due on a single customer account. They state that modification of this system would entail considerable expense and that, until a new mechanized system could be implemented, such bills would have to be processed manually, causing delays in the collection process.

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toll services, should retain the right to terminate service for nonpayment of such LEC toll sevices.

[45] AT&T notes that modification of these switches, which would be extremely costly, would pose a greater burden for the independents than for the BOCs since the independents use a greater proportion of these switches.

Thus, most commenters conclude that the benefits of selective denial are not commensurate with the time and expense that would be required to overcome these technical and adminstrative obstacles, especially since the cost would ultimately be borne by end users through higher toll charges.

29. Furthermore, several LECs argue that billing and collection would be less viable as a competitive service without local cut-offs, and that their unique ability to offer this option does not hinder competition. They contend that local cut-off service is simply one of many features which an IC considers when choosing a billing and collection provider. Ameritech asserts that there is no evidence that the LECs have attempted to abuse this ability[46] or that state regulation of this offering is impeding competition in any way. Ameritech adds that it is unlikely that a state commission would allow a LEC to terminate a customer's service for failure to pay non-telecommunications charges. In this regard, several commenters suggest that, unlike most goods, telecommunications services cannot be recouped if a customer does not pay his bill. AT&T notes that a department store, unlike a telecommunications service provider, has a cut-off mechanism in the form of its ability to stop selling the store's products to delinquent customers by revoking their credit cards. Taking the analogy a step further, BellSouth states that a credit card company which bills for telecommunications service will terminate all of a cardholder's credit privileges for nonpayment of his bills, not just some of them. Similarly, BellSouth argues that when a LEC terminates a customer's local service for nonpayment of interstate toll charges, it is simply denying the customer credit with which to purchase communications services. Moreover, BellSouth notes that a customer whose service is disconnected still has access to alternative forms of telephone service such as public telephones.

IV. DISCUSSION

A. Title II Jurisdiction

30. Title II of the Communications Act describes duties that common carriers have in the provision of interstate or foreign communication services and establishes procedures to enforce those duties. For example, Section 201(a) declares that "[i]t shall be the duty of every common carrier engaged in interstate or

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[46] It notes that less than one out of every three hundred customers nationwide are disconnected each month.

foreign communication by wire or radio to furnish such communication service upon reasonable request therefor, . . . " Section 201(b) declares that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, . . . " Section 202(a) declares that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication, . . . " Section 203(a) provides for the filing of a schedule of charges "for interstate and foreign wire or radio communication" with this Commission and declares that the filing should show "the classifications, practices, and regulations affecting such charges."

31. Two distinct questions must be asked in order to determine whether a particular activity is subject to such Title II regulation. Is the activity an interstate or foreign communication service? Is the person or entity offering the service as a common carrier? Although carrier billing and collection for a communication service that it offers individually or as a joint offering with other carriers is an incidental part of a communication service, we believe that carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act.

32. Billing and collection service does not employ wire or radio facilities and does not allow customers of the service, interexchange carriers, to "communicate or transmit intelligence of their own design and choosing."[47] As stated *supra* in note 2, the functions encompassed by third party billing and collection service are essentially the recording and aggregation of the billing data corresponding to a completed telephone call, the application of the IC's rates to these calls in order to create a customer invoice, the mailing of bills, the collection of customer deposits and bill payments, the handling of customer inquiries concerning their bill, and the investigation of customer fraud or billing evasion activities. In short, billing and collection is a financial and administrative service.

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[47] *NARUC I*, 525 F.2d at 641 n.58, quoting Industrial Radiolocation Service, Docket No. 16106, 5 FCC 2d 197, 202 (1966). Even if we were to stretch this notion by considering the customer call detail generated by a third party billing service as a transmission of data or a communication of sorts, the service would still not fit the definition of communications common carriage inasmuch as such a "communication" would not be established by the carrier's customer, the IC, but by the IC's customer, the end user, through his calling patterns.

33. It also appears doubtful that billing and collection for another carrier can properly be described as a "common carrier" service even if it were deemed to be a "communication" service. Entities other than communications companies, such as credit card companies, often provide billing and collection service for other companies. We are not aware of any precedent for subjecting providers of such services other than local exchange carriers to regulation of the type that is traditionally associated with common carriers and public utilities. If interexchange carriers chose to contract out billing and collection functions to some entity other than a local exchange carrier our present access charge rules would not require the entity that provided the service to file an access charge tariff for billing and collection service.

34. Based on the factors we have described, we reach the conclusion that billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act.

B. Title I Jurisdiction

35. Our conclusion that local exchange carrier billing and collection for an interexchange carrier is not a common carrier communication service for purposes of Title II does not automatically compel the conclusion that we should terminate existing regulation of that activity or refrain from imposing other forms of regulation. We could invoke our ancillary jurisdiction under Title I of the Communications Act for that purpose.

36. Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), gives this Commission jurisdiction over "all persons engaged within the United States in such [interstate for foreign] communication" and Section A(a), 47 U.S.C. § 153(a), defines "communication by wire", which is subject to this Commission's jurisdiction, to include "services . . incidental to such transmission." Section 4(i), 47 U.S.C. § 154(i), empowers this Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." We believe these powers would be sufficient to enable us to regulate exchange carrier provision of billing and collection service to interexchange carriers, but that the existence of such ancillary jurisdiction does not justify exercising those powers.

37. The exercise of ancillary jurisdiction requires a record finding that such regulation would "be directed at protecting or promoting a statutory purpose."[48] We conclude that because there is sufficient competition to allow market forces to respond to excessive rates or unreasonable billing and collection practices on the part of exchange carriers, no statutory purpose would be served by continuing to regulate billing and collection service for an indefinite period. Although we cannot quantify the market shares of the various billing and collection vendors, the record clearly indicates that significant competition exists and will continue to develop. It is important to recognize that competition is defined not only by credit card companies, collection agencies, service bureaus and the LECs,[49] but by the customers (ICs) themselves. To the extent that ICs are able to meet their own billing and collection needs,[50] the market acts on the LEC in much the same way as competition from other third party billing vendors does. In either case, the effect is to put downward pressure on LEC rates.

38. In addition, nearly 60 percent of the LECs reported rate or return figures below 12.75 percent for the period between June 1984 and May 1985. Many of these same LECs, however, proposed in their access filings either to decrease or to maintain their current billing and collection rates.[51] As we noted at that time, "this pattern tends to support the Commission's view that

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[48] Second Computer Inquiry, 77 FCC 2d 384, 433 (1979). (*Computer II*), *aff'd on reconsideration*, 84 FCC 2d 50, 92-93 (1980), 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom.* Louisiana P.S.C. v. United States, 461 U.S. 938 (1983). *see* United States v. Southwestern Cable Co., 392 U.S. 157, 173 (1968); Midwest Video Corp. v. FCC, 406 U.S. 649, 659-60 (1972); Home Box Office v. FCC, 567 F.2d 9, 36, 40, 43 (1977).

[49] Competition between the BOCs may even develop. This will of course depend on their getting authorization from the District court to offer billing and collection services outside their franchised areas. *See supra* note 25.

[50] While we recognize that AT&T does not have the ability to become completely self-reliant at the present time, the record indicates that AT&T will have this ability to a large extent soon. AT&T has already assumed the billing inquiry function in most areas and will start doing some of its own billing for WATS in 1986 and for its largest MTS customers in 1987. In addition, it plans to assume the recording function in all equal access offices during 1987. In the interim, the transition period we adopt in this Order, coupled with the LECs' incentive to develop a rational economic relationship with AT&T in order to keep its business (a possibility which is enhanced to the extent that states continue to allow local cut-offs), should ameliorate any concern that detariffing will leave AT&T to protect itself.

[51] *See* Annual 1985 Access Tariff Filings, Mimeo No. 7401, released Sept. 30, 1985, at para. 49.

billing and collection rates are subject to competitive pressures."[52] Moreover, there are no barriers to entry in the billing and collection market.[53] The capital costs are relatively low inasmuch as billing and collection is an expense oriented service.[54] While it is true that LECs possess the unique ability to offer local cut-offs, this ability simply gives LECs an additional selling point. It has not acted as an insurmountable competitive advantage. Evidence of this is the fact that ICs, even with the LEC-provided local cut-off option available to them, have for the most part elected to provide their own billing and collection service (without any local cut-off function). This fact suggests that ICs regard price as a more important consideration than the local cut-off option in choosing a billing and collection service. Indeed, it is the LEC which currently is at a competitive disadvantage *vis-a-vis* other billing and collection vendors since the latter are not subject to tariff regulation. As we have noted in a similar context:

> [I]f carriers remain subject to tariff regulation when they provide CPE, it will be difficult for them to respond in a timely manner to competitive initiatives of non-carrier vendors because the carriers would be required to comply with various notice and information filing requirements, in addition to lacking flexibility to respond to competitive price initiatives.[55]

Thus, we conclude that detariffing will enhance competition in the billing and collection market by giving the LECs flexibility in structuring and pricing their offerings.

C. Transition Period

39. Although no statutory purpose would be served by continuing tariff regulation indefinitely, we have decided that the

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[52] *Id.*

[53] The only potential bottleneck in this respect is an IC's or billing vendor's inability to get customer name and address information from the LEC. In the *February 17 Order*, 97 FCC 2d at 1287, we rejected a tariff provision which would have restricted access to such information because it had the effect of impeding the IC's ability to perform its own billing and collection. To the extent that our rationale for not asserting Title I jurisdiction is based, in part, on the IC having this ability, it is our expectation that LECs will continue to make this type of information available on a reasonable basis. Should problems develop in this respect, we would consider requiring LECs to fulfill IC requests for this information.

[54] For example, the access year forecast in New York Telephone Company's monitoring plan data indicates that for the interstate billing and collection category the ratio of expense to investment will be 6.47 whereas the total interstate ratio will be .63. *See* New York Telephone Company, Tariff F.C.C. No. 41, Volume 2-4, Development of Access Monitoring Results and Past Year Cost of Service Study, at Workpaper 3.3.

[55] *Computer II*, 77 FCC 2d at 446.

detariffing of LEC billing and collection services should be deferred until January 1, 1987. We believe that it is necessary to require that these services be offered under tariff for the remainder of this year in order to effect a smooth transition to a deregulated environment.

40. The continuation of tariff regulation for that interval is necessary for several reasons. We have decided that we should not adopt the permissive detariffing approach proposed in the *Notice* because we have concluded that it would not be appropriate to permit the tariffing of a service that is not a communications service.[56] This delay in the effectiveness of our decision should afford the BOCs ample time to obtain a waiver from the *MFJ* court to permit them to provide untariffed billing and collection services if the BOCs believe such a waiver is necessary.

41. Even if the *MFJ* restrictions did not exist, it would probably be necessary to impose some restriction upon charges that BOCs and independent telephone companies could adopt for billing and collection services for a short period of time in order to provide AT&T with an opportunity to develop its own billing system. The divestiture left AT&T without an effective billing system to accommodate its massive billing requirements. Although billing and collection is not inherently a bottleneck monopoly, those unique circumstances created a temporary bottleneck that could have exposed AT&T to exorbitant demands for the temporary use of LEC billing capabilities. This problem has not dissipated entirely, but should not be a significant factor by 1987.[57]

42. A transition period is also necessary to accommodate the needs of those LECs currently participating in the NECA billing and collection pool by giving them ample time either to absorb this function into their own operations or to establish a non-tariffed pooling arrangement with NECA. For purposes of making this latter option possible, this Order will serve to authorize NECA to engage in such an unregulated activity.[58] A fourth and related reason for a transition period is to allow for the

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[56] The mandatory detariffing requirement in this Order is not inconsistent with the court's holding in MCI Telecommunications Corporation v. FCC, No. 85-1030 (D.C. Cir. July 9, 1985) because that case involved tariffs for services that are classified as communications services for purpose of Title II.

[57] Because tariffs will remain on file with us for this period, there is no need to adopt AT&T's proposed price and service protection plan.

[58] Section 69.603(a) of the Commission's Rules provides that NECA "shall not engage in any activity that is not related to the preparation of access charge tariffs or the collection and distribution of access charge revenues unless such additional activity is expressly authorized by order of the Commission."

negotiation of contracts to the extent that becomes necessary.[59] Finally, this delay in the implementation of detariffing will give us the opportunity to consider any further issues raised by detariffing, should that become necessary.

43. Because LECs will continue to be limited to a 12.75 percent rate of return for 1986, but will be relieved of this constraint as of the following year, we will be unable to require that carriers adjust their 1987 revenue requirements should they exceed their authorized rates of return in 1986.[60] The continuation of tariff regulation will, however, preclude the LECs from implementing any increases in billing and collection rates during 1986 that are not cost justified.

44. Effective upon the expiration of this transition period, Part 69 of the Rules will have to be amended to reflect the deregulated status of billing and collection service. Accordingly, Section 69.114, which provides for a separate billing and collection rate element, will be repealed, effective January 1, 1987. We will adopt other conforming changes with respect to the Part 69 apportionment rules in a subsequent order to be issued after completion of our docket concerning the allocation of commercial expenses.

D. Recording

45. We do not adopt the tentative conclusion of the *Notice* that the recording function[61] should remain under tariff indefinitely. We are convinced by the comments that inasmuch as the rationale for detariffing other billing and collection functions is based, in part, on the ability of ICs to perform these functions internally, there is no basis for distinguishing recording given the ICs' apparent ability to perform this function as well. Most ICs do not presently rely on LECs for recording largely because FGA and FGB facilities are generally unable to capture call detail. AT&T, which uses FGC, apparently plans to assume the recording function in equal access offices during 1987. Moreover, as Ameritech notes, the availability of ANI under FGD will enable any IC to perform its own recording at minimal cost. Thus, our concern that the undertaking of recording by entities other than LECs would result in a wasteful duplication of facilities appears to be moot.

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[59] Such carrier-carrier contracts would have to be filed with the Commission under Section 211(b) of the Act, 47 U.S.C. § 211(b).

[60] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527, released Sept. 30, 1985, at para. 34.

[61] For a description of this function, *see supra* note 8.

46. We recognize, however, that recording does differ from other billing functions in at least one respect — it cannot generally be provided by other third party billing vendors since it is performed as a function of network switching operations. Moreover, AT&T indicates that there may be some lag in its assumption of recording functions since that undertaking is tied to equal access conversion and the implementation of the rest of its billing system. We will, therefore, require that LECs continue to offer recording service to all ICs upon reasonable request through 1989 or until the equal access conversion process has been completed, whichever is later. Although this service will not be tariffed after 1986, the LECs will be required to offer reasonable terms for this service. We are imposing these requirements pursuant to our Title I powers in order to ensure that interexchange carriers will be able to provide their communications in an efficient and economical manner. This period should be adequate to prevent any short-term dislocations and to allow ICs either to make arrangements with LECs for the continued provision of this service or to assume this function as part of their own operations. From the LECs' perspective this should not constitute an unreasonable burden since they must generally record call detail anyways in order to bill ICs for access services.[62]

47. We note that the *MFJ* conceivably might be construed to preclude the BOCs from providing recording services on an untariffed basis.[63] We doubt that any conflict would arise because the exchange access services that the *MFJ* permits BOCs to provide appear to encompass services that may not be classified as "communication service" for purposes of Title II and would probably encompass the recording function.[64] Even if the district court did not adopt such an interpretation, that court presumably

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[62] This sharing of equipment forms the basis for the request of several LECs that recording costs be reassigned to the switched access category. *See supra* para. 17. We deny these requests. The argument that the recording function is incidental to switching operations can be made with respect to almost any access element since all such functions are interrelated in some degree. In addition, a reassignment of recording costs based on the LECs' concern that these costs may go unrecovered if ICs do not purchase recording service would be premature at the present time since AT&T still subscribes to this service.

[63] Our decision to require the detariffing of other billing and collection services could not create any conflict with the *MFJ* because the *MFJ* does not affirmatively require that these services be offered.

[64] *See* 552 F. Supp. at 228 (BOC Requirements, Section D.3 and definition of "exchange access").

would grant any waiver that it might deem necessary.[65] Even if the court did not grant an express waiver, compliance with our order could not subject the BOCs to potential contempt liability because an antitrust decree in a regulated industry cannot preclude compliance with subsequent orders of a federal regulatory agency. *See Carnation Co. v. Pacific Westbound Conference*, 383 U. S. 213 (1966); *United States v. St. Louis Terminal*, 224 U. S. 382, 412 (1912).

E. Separations

48. Most billing and collection costs are included in Accounts 645 and 662. Costs in these accounts are allocated between the state and interstate jurisdictions on the basis of a number of factors, including relative number of customer contacts, messages and users. We recently revised the apportionment of Account 645 costs in a manner that will facilitate segregation of billing and collection functions for other carriers from the cost of providing billing and collection for a carrier's own services.[66] We have also proposed revisions in the access charge rules designed to segregate these costs.[67] The interstate billing and collection costs to be assigned to the deregulated billing and collection service will be calculated in compliance with Part 67 and Part 69 of our Rules and Regulations. Thus, the deregulation of billing and collection services should not shift costs between the state and interstate jurisdictions. It merely removes some interstate costs from the regulated arena. Any charges in the separations procedures necessitated by the changes currently taking place in the market for billing and collection services will be developed in Joint Board proceedings.

F. Separate Subsidiary and Accounting Requirements

49. We agree with commenters that a separate subsidiary requirement applicable to the detariffed provision of billing and collection services is not warranted. The efficiencies of joint operation in the provision of intrastate and interstate billing and

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[65] We note that Judge Greene has recently granted waivers to Bell Atlantic and US West to provide non-tariffed billing services other than those provided to interexchange carriers. United States v. Western Electric Company, Inc. and American Telephone and Telegraph Company, Civil Action No. 82-0192 (D.D.C. Sept. 24, 1985). Ameritech was granted a similar waiver on May 24, 1985.

[66] *Decision and Order*, *supra* note 9.

[67] Notice of Proposed Rulemaking, MTS and WATS Market Structure, CC Docket No. 78-72, FCC 86-12, released Jan. 8, 1986.

collection services clearly outweigh the potential for cross-subsidization. Such a requirement would unnecessarily increase the ICs' costs of obtaining this service from the LECs and these higher costs would ultimately be borne by the ICs' ratepayers. Should a LEC wish to provide billing and collection service through a separate subsidiary, our action here would not prohibit the establishment of such a subsidiary, but we agree with NATA that it should not be the same subsidiary which provides CPE and enhanced services.

50. We conclude that the maintenance of an accounting and allocation system will be an adequate safeguard against any cross-subsidization of unregulated billing and collection activities. We recognize that most of the costs involved here are joint and common. As indicated in the *Fifth Order*, we will address the allocation of joint and common costs in another notice of proposed rulemaking, and until those permanent allocation procedures are adopted, carriers should allocate costs to nonregulated billing and collection activities as described *supra* in paragraph 48. We also generally agreed in the *Fifth Order* that common costs should be recorded on the regulated books and that allocations should be made for the nonregulated portions. We expect that generic rules for the allocation of joint and common costs between regulated and unregulated activities will be adopted during 1987. Therefore, we will not require the LECs to submit an accounting plan for billing and collection activities at this time.[68]

G. Local Cut-Offs

51. We shall continue to defer to state regulatory authorities with respect to the practice of local cut-offs. While we do not intend, by this action, to give tacit approval to this activity, we are inclined to agree with commenters that the practicalities weigh in favor of state resolution. *See supra* para. 26. This approach does not seem to have had any adverse effects from either a consumer or competitive standpoint. *See supra* paras. 29 and 38. We do, however, wish to clarify the nature of our deferral to the state commissions. We believe that the state commissions should determine whether LECs will be permitted to discontinue local services for nonpayment of interstate toll services that are not offered by the LEC.[69] We also defer to the state commissions

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[68] We will not address AT&T's request that LECs be required to bill and account for access charges separately from billing and collection charges, *see supra* para. 25, since it is beyond the scope of this proceeding.

[69] We are not permitting the states to preclude LECs from discontinuing all

to determine questions such as the amount of notice that a customer must be given before discontinuance occurs. Our decision to defer to the state commission with respect to these questions should not, however, be interpreted to permit state commissions to impose charges upon ICs for a "cut-off service." Any cut-off that occurs in conjunction with an interstate interexchange carrier service is a part of the billing and collection service. All charges for that billing and collection service must be filed with this Commission in accordance with our Part 69 rules until the end of 1986 and any revenues from such charges must be deemed to be interstate revenues for purposes of the Part 67 jurisdictional separations rules.

52. Although a decision to cease regulating a service because it is not interstate communications for purposes of Title II does not automatically preclude state regulation, we have concluded that we should give preemptive effect to our decision with respect to LEC billing and collection for interstate services of interexchange carriers. State rate regulation of such billing and collection services is not required to protect interstate interexchange carriers and their customers from excessive billing and collection charges and might lead to excessive charges that would tend to frustrate the goals of the Communications Act. Therefore, we have decided to preclude such regulation.[70]

V. CONCLUSION

53. Our brief practical experience in regulating what is clearly a non-communications service tells us that our decision here is sound from a policy as well as a legal standpoint. Deregulating billing and collection will serve the interests of LECs by giving them greater flexibility in structuring and pricing this service, thereby enhancing their ability to retain and attract customers. It will serve the interests of their customers, the ICs, by enabling them to get billing and collection packages tailored to their specific needs at rates that are more directly based on the LECs' costs. Finally, deregulation will serve the interests of subscribers

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service to customers who fail to pay for that LEC's interstate services (*e. g.*, corridor service) including the subscriber line charges.

[70] We have exercised our power to preclude state regulation of analogous activities in the past. *See* Land Mobile Service, Docket No. 18262, 51 FCC 2d FCC 2d 945, 974 (1975), *aff'd sub nom. NARUC I*, 525 F.2d at 646. (Commission preempted possible assertion of state entry certification over special mobile radio systems); *Computer II*, 77 FCC 2d 384, *supra* note 48. (Commission preempted state regulation of customer premises equipment and enhanced services.

by holding down the carriers' administrative costs of providing telephone service.

VI. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED, pursuant to Sections 2(a), 4(i), 4(j), 201–205, 218, 220, 403 and 410 of the Communications Act, 47 U.S.C. §§ 152(a), 154(i), 154(j), 201–205, 218, 220, 403 and 410, that the policies and requirements set forth herein ARE ADOPTED.

55. IT IS FURTHER ORDERED, pursuant to Section 61.58(c)(3) of the Commission's Rules, 47 C.F.R. § 61.58(c)(3), that local exchange carriers ARE REQUIRED TO CANCEL their interstate billing and collection tariff pages on 35 days' notice to be effective January 1, 1987.

56. IT IS FURTHER ORDERED, that Section 69.114 of the Commission's Rules, 47 C.F.R. § 69.114, IS DELETED, EFFECTIVE January 1, 1987.

57. IT IS FURTHER ORDERED, pursuant to Section 69.603(a) of the Commission's Rules, 47 C.F.R. §69.603(a),A that the National Exchange Carrier Association IS AUTHORIZED to operate a billing and collection pool on an untariffed basis.

58. IT IS FURTHER ORDERED that the Secretary shall cause this Report and Order to be published in the Federal Register.

59. IT IS FURTHER ORDERED, pursuant to Section 220(i) of the Communications Act, 47 U.S.C. § 220(i), that the Secretaryshall serve a copy of this Report and Order on each state commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, Secretary

APPENDIX B

Part 69--[AMENDED]

Part 69, Chapter 1 of Title 47, Code of Federal Regulations, is amended as follows:

1. By deleting § 69.114.

Character Qualifications, Abuse of Process
Character Qualifications, Concealment
Character Qualifications, Effect of Criminal Conviction
Character Qualifications, Effect of Misrepresentation
Character Qualifications, Lack of Candor
Character Qualifications, Non-Applicant

> ***Report and Order and Policy Statement*** **adopted establishing general guideline principles to be sued in evaluating the character qualifications of b/c applicants. This action establishes the range of relevant behavior, both FCC related and non-FCC related, which the Commission will consider in its licensing process. Policies pertaining to character implications in the corporate and multiple ownership context are clarified. This action eliminates character as an issue in comparative proceedings unless the character defect goes to the applicant's basic qualifications.**
>
> — *Character Qualifications*
>
> Gen Docket 81-500

FCC 85-648

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Policy Regarding Character Qualifications In Broadcast Licensing	Gen. Docket No. 81-500
Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees	BC Docket No. 78-108

REPORT, ORDER AND POLICY STATEMENT

Adopted: December 10, 1985; Released: January 14, 1986

BY THE COMMISSION:

I. INTRODUCTION

1. Before the Commission is our *Notice of Inquiry* (hereinafter "NOI") in Gen. Docket No. 81-500[1], regarding character qualifications in broadcast licensing, and the comments and reply comments submitted in response thereto. Also before the Commission is our *Notice of Proposed Rule Making* (hereinafter "NPRM") in BC Docket No. 78-108[2], concerning establishment of new broadcast rules mandating the submission of timely and accurate responses to Commission inquiries by permittees and licensees, and the comments filed in response to that NPRM.[3] The related nature of these proceedings makes their joint consideration appropriate.[4]

II. Purpose of the Proceeding

2. Section 308(b) of the Communications Act states in pertinent part that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the applicant to operate the station . . . ." (Emphasis supplied.) Similar language regarding construction permit applications is found in Section 319(a), and, under the provisions of Section 310(d) of the Act, applications for transfer or assignment of permits or licenses are treated as if the proposed transferee or assignee were filing under Section 308. The finding of facts regarding qualifications is not, however, an end in itself. Rather, it is a step in the process of evaluation by which the Commission determines whether the public interest would be served by grant of the application before it.[5]

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[1] 87 FCC 2d 836 (1981).

[2] 43 Fed. Reg. 14693 (April 7, 1978).

[3] A complete list of those commenting in both proceedings appears as Appendix "A".

[4] *See* our discussion of BC Docket No. 78-108 in the NOI, 87 FCC 2d at 855, n. 59.

[5] *See* Sections 307(a), 309(a), and 319(c) of the Communications Act. Under Section 309(i), only the qualifications of the "tentative selectee" are fully examined. The sole broadcast service currently subject to licensing by lottery is

3. In the NOI, the Commission observed that we had, over the years, "considered a wide range of conduct in examining applicants' character." We stated that this action had been taken "without the benefit of a comprehensive policy statement detailing the relevance of the character examination to the broadcast licensing scheme and identifying what conduct is pertinent to the analysis."[6] It was the Commission's objective in this proceeding, we said, to develop a "clearly articulated licensing policy" which would allow us to "focus on behavior which is truly relevant to broadcast licensing and to tailor [our] actions to these licensing goals." Such a policy, we hoped, would facilitate "more consistent and, thus, fairer decisionmaking by the Commission." It would also "reduce the substantial amount of time and resources now spent by this agency examining questions relating to an applicant's conduct which, even if resolved against the applicant, would not cause the Commission to deny the application."[7]

4. The fundamental thrust of the NOI, then, was the Commission's concern that those "character" matters considered in broadcast licensing proceedings be clearly relevant to the licensing process, and that the process be made more equitable and efficient.[8] We explained that one source of difficulty in reaching such an objective has been the lack of Congressional guidance as to the definition of "character" to be utilized by the Commssion. This has, on occasion, led to use by either the Commission or the courts of a wide-ranging notion of "moral" character of limited value in the licensing process.[9] Use of the absolutist concept of

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low power television ("LPTV").

[6] We noted that the only policy guidance on this issue, which deals with but one aspect of it, was adopted more than thirty years ago. *Establishment of a Uniform Policy to be Followed in Licensing of Radio Broadcast Stations Cases in Connection with Violation by an Applicant of Laws of the U.S. Other than the Communications Act of 1934, as Amended*, 42 FCC 2d 399 (1951) (hereinafter "*Uniform Policy*").

[7] NOI, *supra* note 1, at 837.

[8] Applicants' claims of inequitable treatment are a frequent feature of proceedings involving character. The Commission's obligation to explain departures from precedents in this area, and, where it relies on factual differences with such precedents, to explain the relevance of those differences to its purposes and those of the Communications Act (unless the differences are so obvious as to remove the need for explanation) was made clear in *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). *See also, White Mountain Broadcasting Co. v. FCC*, 598 F.2d 274, 277-280 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 963 (1979). As to the epic length and complexity which proceedings involving character issues may assume, *see RKO General, Inc. v. FCC*, 670 F.2d 215, 218-221 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *Mid-Florida Television Corporation*, 87 FCC 2d 203, 204-209 (1981).

[9] The broadcast definition of character in this vein appears to have been articulated in *Mester v. United States*, 70 F. Supp. 118, 122 (E.D.N.Y. 1947),

"moral" character requires the Commission to explain why behavior which evidences sufficiently "bad" character to warrant denial of an application in one instance does not mandate the same result in another, apparently similar case.[10]

5. Additional difficulties arose, the Commission observed, in the disparity of treatment which had been accorded existing licensees, whose broadcast record might be factored into Commission analyses in mitigation of character "defects," and new nonbroadcaster applicants, as to whom no such record was available. Further complexity was involved in the disposition of "character" issues involving owners of groups of stations. For example, if the judgment is made that a broadcaster is of sufficiently "bad" character to be denied license renewal in one community, may that same "bad" entity still be allowed to retain a license in another community?

6. Our review of the record in this proceeding and the experience gained from years of evaluating the character qualifications of numerous applicants convinces us that substantial changes to the Commission's character policies are warranted. Generally, the Commission considers an applicant's character in two contexts. Initially, the Commission conducts an inquiry as to whether an applicant possesses the basic threshold character qualifications necessary to be a licensee or permittee. The second setting in which character issues may be raised is as part of a comparative proceeding. Once a character issue has been designated in a comparative proceeding, the Commission makes a determination whether an applicant should receive a comparative demerit. In this regard, the Commission's character evaluations in

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aff'd per curiam, 332 U.S. 749 (1947), cited with approval in such cases as *Southeastern Massachusetts Broadcasting Corp.*, 12 FCC 363, 372 (1947); *WKAT, Inc.*, 29 FCC 221, 238 (I.D. 1958); *Armond J. Rolle*, 31 FCC 2d 533, 536, (Rev. Bd. 1971); and *RKO General, Inc.*, 78 FCC 2d 1, 48-49 (1980), *aff'd in part, remanded in part on other grounds, RKO General, Inc. v. FCC, supra* note 8. As to the dangers inherent in the use of such terminology as "good moral character," see *Konigsberg v. State Bar of California*, 353 U.S. 252, 262-264 (1957).

[10] *See supra* note 8. The Commission is not, of course, bound "to deal with all cases at all times as it has dealt with some that seem comparable," *FCC v. WOKO*, 329 U.S. 223, 228 (1946), and it frequently occurs that decisions turn on meaningful distinctions found in the course of case-by-case reviews. As to the difficulty of reconciling apparently disparate treatment, however, *see Cumberland Broadcasting Corporation v. FCC*, 647 F.2d 1341 (D.C. Cir. 1980) (Brief acquiescence in attorney misconduct does not warrant disqualification); *WADECO, Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980) (lengthier period of apparent acquiescence in attorney's actions leads to disqualification); *WEBR, Inc. v. FCC*, 420 F.2d 158 (D.C. Cir. 1969) (good faith reliance on counsel in case where application not properly amended avoids disqualification).

comparative proceedings have necessarily resulted in an attempt to determine which applicant possesses the best character and have caused parties to such proceedings to seek to impugn each others' character in pursuit of comparative hearing advantages.

7. We believe it is appropriate to modify both aspects of the Commission's character inquiry. With regards to the basic threshold character evaluation, we find that the scope of the present inquiry is overly broad. Accordingly, future inquiries into an applicant's basic character eligibility will be narrowed to focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies. An analysis of these specific traits will serve as guidelines for all future inquiries regarding applicant misconduct. Thus, while we shall continue to refer to such evaluations as a character inquiry, the scope of our analysis will be much narrower than the term "character" implies. Consistent with this new approach, we will modify the range of both FCC related and non-FCC related misconduct that will be considered relevant to our inquiries.[11] In addition, modifications will be made to threshold character inquiries arising in the corporate and multiple ownership contexts. Second, we believe that once the basic character fitness of a potential licensee has been established, character issues should not be considered as a comparative issue. Thus, character issues will no longer be designated as comparative issues in either competing new or in comparative renewal proceedings.

8. We shall now turn to a discussion of the specific issues raised by the NOI in this proceeding. An analysis of issues relating to narrowing the focus of our threshold character inquiry appears in Section III below. Section IV contains a discussion of the issues relating to character in the comparative context. Our decision regarding the issues raised by the NPRM in BC Docket No. 78-108 can be found in section V.

III. Issues Analysis

9. The Commission addressed the issues inherent in the consideration of "character" by raising a series of questions in the NOI

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[11] FCC related misconduct describes activity which violates the Communications Act or a specific Commission rule or policy. *See* 47 U.S.C. § 151 et. seq.; 47 C.F.R. §§ 0.1 et. seq. The term non-FCC misconduct describes misconduct which may be a violation of law but does not specifically contravene the Communications Act or a specific Commission rule or policy. In this regard, we note that non-FCC misconduct may include broadcast station related misconduct not specifically proscribed by the Act or the Commission. See *infra* at para. 31.

on which parties might comment. At the same time, we indicated our tentative views on these matters. We believe it appropriate to resolve the issues before us in a similar fashion. Thus, our format in this document will be to present the question first set forth by the Commision in the NOI, summarize our initial (NOI) views on the matter, discuss the comments received, and state our conclusions as to the policy to be followed in the future.

A. "Character" vs. "Conduct"

1. Questions in the NOI

10. The first two questions raised in the NOI lend themselves to joint consideration:

> "(a) What purpose is served by scrutinizing an applicant's so-called 'character' qualifications?"
>
> "(b) Is there a better way to evaluate an applicant's future reliability than the kind of wide-ranging inquiries conducted in the past?"

11. As to the purpose served by scrutinizing an applicant's character qualifications, the Commission stated in the NOI that while the applicant's legal, technical and financial qualifications help to establish the entity's ability to perform, they do not "tell us whether we can rely on the applicant to perform prospectively all of the obligations of a broadcast licensee." Thus, we tentatively concluded that "our concern with probable future behavior is unavoidable," and that if we have "reason to believe an applicant cannot be expected in the future to fulfill its obligations as a broadcast licensee, its application should be denied."[12]

12. However, the Commission questioned whether we should continue to attempt to forecast an applicant's reliability as a licensee by examining its *character* as such. Would it not be more appropriate, we asked, for the Commission to "evaluate *directly* the relevance of an applicant's past *misbehavior* to its capacity to use the requested radio authorization in the public interest." (Emphasis supplied). We stressed the point that in the licensing process, the "only relevant misconduct" might well be "that which aids us in predicting what type of broadcast activity may

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[12] However, we questioned whether we should continue to try to predict the prospective broadcast performance of a new nonbroadcaster applicant. We asked whether, as to this new applicant, with no broadcast record, an alternative might be to "withhold judgment at the time of initial licensing and rely on our forfeiture and revocation powers to deal with actual problems with a licensee's performance." *See infra* para. 49.

be expected in the future." We suggested that past consideration of applicants' "moral" character had involved inquiries going substantially beyond these boundaries. Thus, we queried whether the Commission was "required specifically to consider an applicant's moral character during the licensing process." We requested comment on the actual nature of the duty, if any, imposed upon the Commission by Section 308(b) and Section 319(a).

2. Comments Regarding What Section 308(b) Requires

13. It appears that the threshold issue in this aspect of this proceeding is the matter of what sort of inquiry into character, if any, the Communications Act requires. Commenting parties' views in this regard may generally be summarized as concluding that, at the least, the Commission has substantial discretion under the statute to determine the manner in which it will consider character issues. Parties such as CBS, Inc. ("CBS") believe that the inquiries authorized by Sections 308(b) and 319(a) are permissive, while other commenters, including Citizens Communications Center ("Citizens"), see the provisions as mandatory. However, almost all of those commenting on this point agree that the Commission is allowed significant latitude as to the scope of the inquiry to be conducted. American Broadcasting Companies, Inc. ("ABC") and Tribune Company ("Tribune") further note that the focus of Section 308(b) and Section 319(a) is the consideration of the qualifications of the applicant "to operate the station," a concern which does not appear to mandate examination of an applicant's "moral" character in the licensing process.[13]

3. Conclusions on Section 308(b) Requirements

14. The Commission acknowledges, as the National Citizens Committee for Broadcasting ("NCCB") points out, that in the *Uniform Policy* the Commission itself concluded that Section 308(b) both gave it "the authority and imposed upon it the duty" to examine basic character qualifications "in evaluating applicants for radio facilities." However, even in that document the Commission indicated its awareness of its discretion as to the substance of such examinations, stating that these inquiries obviously did not "include every aspect of an applicant's behavior, but only that part which has some reasonable relationship to ability to

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[13] *See infra* para. 21.

operate a broadcast station in the public interest."[14]

15. A review of the case law on this point indicates that the courts have on a number of occasions read Sections 308(b) and 319(a) to require Commission inquiry into character.[15] This has not, however, been the conclusion reached in at least two recent cases. In *National Association of Regulatory Utility Commissioners v. FCC*,[16] the D.C. Circuit Court of Appeals interpreted Section 308(b) as leaving it "within the discretion of the Commission to decide which facts" relating to the factors, such as character, enumerated in that section, "it wishes to have set forth in applications." The Court found that "this leaves the Commission free to have no facts set forth on any of these matters, if it finds such action appropriate." This being so, the Court concluded, it necessarily followed that in the matter then in dispute the Commission was not required to consider the subject of financial fitness at all if it deemed that area "irrelevant to its regulatory scheme." In a subsequent case, *Black Citizens for a Fair Media v. FCC*,[17] the D.C. Circuit Court of Appeals, citing *NARUC I* with appoval, reaffirmed the Commission's discretion over the nature of the inquiries to be conducted as part of the licensing process.[18]

16. Upon reflection, we are of the view that the better-reasoned approach is that taken in *NARUC I* and *BCFM*. That is, we find that the list of subjects as to which the Commission "may inquire" in sections 308(b) and 319(a) is neither exhaustive nor

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[14] *Uniform Policy*, 42 FCC 2d at 400.

[15] The cases generally provide little supporting analysis. *See Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594 598 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 931 (1979), *reh. denied*, 442 U.S. 947 (1979); *Lebanon Valley Radio, Inc. v. FCC*, 503 F.2d 196, 200 (D.C. Cir. 1974); *WEBR, Inc. v. FCC, supra*, at 164; *L.B. Wilson, Inc. v. FCC*, 397 F.2d 717, 719 (D.C. Cir. 1968); *Charles P.B. Pinson, Inc. v. FCC*, 321 F.2d 372, 374 (D.C. Cir. 1963); *Stahlman v. FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942). *See also, KSIG Broadcasting Company v. FCC*, 445 F.2d 704, 709-710 (D.C. Cir. 1971).

[16] 525 F.2d 630, 645 (D.C. Cir. 1976) *cert. denied*, 425 U.S. 992 (1976) (hereinafter "*NARUC I*").

[17] 719 F.2d 407 (D.C. Cir. 1983) *cert. denied* 104 S. Ct. 3545 (hereinafter "*BCFM*").

[18] The commission's discretion, the Court observed, runs both to defining the public interest and to determining the FCC procedures which "best assure protection of that interest." The Court did, however, read Section 308(b) "to require the inclusion of certain technical information, such as licensee ownership, although it does not prescribe specific questions." *Id.*, at 413. As to the matter of the Commission's discretion, see generally *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 206 (D.C. Cir. 1956), *cert. denied*, 350 U.S. 1007 (1956); *FCC v. WOKO, supra* note 10, at 227-229; *Stahlman v. FCC, supra* note 15, at 127; *FCC v. Pottsville Broadcasting Company*, 309 U.S. 134, 138, 143-146 (1940).

mandatory. These statutory sections do not of themselves require that the Commission make any inquiry into the character qualifications of broadcast applicants.[19]

17. Whether and, if at all, to what degree the Commission ought to inquire into the character qualifications of its broadcast applicants is thus a matter which must be determined by consideration of the "regulatory scheme" of the Communications Act. In this regard, it appears that the relevant inquiry to be made is whether the "public interest" standard embodied in the Communications Act requires or would be served by the continuation of Commission inquiries into character as part of the licensing process. Assuming such an inquiry is appropriate, the question becomes whether an evaluation of an applicant's behavior should include all aspects of the applicant's character or whether the inquiry should focus on specific traits that are directly relevant to our regulatory scheme. Our resolution of this question is advanced by consideration of the responses to our question in the NOI as to the purpose served by scrutinizing an applicant's character qualifications.

4. Comments on Purpose of "Character" Scrutiny

18. We note that most commenters, including the National Radio Broadcasters Association ("NRBA"), the National Broadcasting Company, Inc. ("NBC"), Tribune and CBS, believe the proper focus of our qualifications inquiry is, as the Commission suggested in the NOI, prediction of the reliability of the broadcast service to be provided the public by the applicant. In taking this approach, NBC and others state, the Commission's concern should be with the predictive nature of significant past *conduct* upon the licensee's future broadcast performance, rather than with the morally-tinged *character* concept. The National Association of Broadcasters ("NAB"), however, suggests that the way to avoid judgments regarding "good" and "bad" character is to focus the Commission's licensing process on deterrence of misconduct and minimize "the making of predictive judgments concerning licensee fitness."

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[19] We observe that this view also appears in accord with Judge Wright's dissenting opinion in *BCFM*. *BCFM, supra* note 16, at 430–431. Additionally, this reading is consistent with general principles of statutory construction. 2A C.D. Sands, *Sutherland Statutes and Statutory Construction* § 57.11 (4th ed. 1972).

19. Contrary to this approach, NCCB and the National Black Media Coalition ("NBMC") state that inquiring into *character* itself is necessary to fulfill the Commission's duty to ensure that broadcasters operate in the public interest. Citizens contends that as deregulation of broadcasting proceeds, the Commission's need to rely on its licensees' judgment and good faith increases, and that the character inquiry is relevant to trustworthiness. The Office of Communication, United Church of Christ ("UCC") views the inquiry into character qualifications as a positive means of determining the ability of the licensee to make good on its promises and obligations to the Commission, its advertisers and the general public.

20. ABC argues that as Section 308(b) is concerned with the Commission's inquiry into the qualifications of the applicant "to operate the station," the Commission should narrow its definition of "character" to the traits necessary to accomplish that purpose. To achieve that objective, ABC contends, the Commission must first define what constitutes station operation in the public interest, at least for these limited purposes. A grant would be consistent with the public interest, ABC suggests, if the Commission can find that "(a) the applicant can reasonably be expected to be honest and candid in its dealings with the Commission . . . and (b) the applicant can reasonably be expected to operate the broadcast facility consistent with the requirements of the Act, Commission rules and policies."[20] The essential affirmative character traits which are relevant to the Commission's statutory objectives, ABC concludes, are honesty and responsibility.[21]

5. Conclusions About Character and the Public Interest Standard

21. The Commission enjoys broad discretion "both to define the public interest and to determine what procedures best assure protection of that interest."[22] We find that there is great merit to

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[20] The Commission, ABC states, does not appear to have ever required more, citing *Central Texas Broadcasting Co., Ltd.*, 74 FCC 2d 393, 396 (1979).

[21] As to the NOI's question regarding the usefulness of continuing to attempt to predict a new, non-broadcaster applicant's future broadcast performance, parties commenting on the matter, including CBS, ABC and Citizens, generally suggest that such inquiry, including some consideration of past nonbroadcast misconduct, if any, may be necessary. However, NAB argues that such inquiries regarding new applicants are of dubious value. *See infra* paras. 26-30.

[22] *BCFM, supra* note 17, at 413. See, also, *FCC v. WNCN Listeners Guild, supra* note 18, at 596; *FCC v. Pottsville Broadcasting Company, supra* note 18 at 137-138 (1940).

ABC's conclusion that for the purposes of the present discussion, a license grant would be in the public interest if the applicant can be expected to be honest in its dealings with the Commission and can also be expected "to operate the station" consistent with the requirements of the Communications Act and the Commission's rules and policies. ABC identifies the "character" traits of honesty and responsibility as relevant to fulfilling these objectives. Viewed from this perspective, we believe that inquiry into "character" as an element of the licensing process is consistent with the regulatory scheme. As the Commission long ago observed, licensing "enables future conduct." Issuance of an authorization "entails at best only an estimate that performance under the license will be worthy." Thus, it is wholly appropriate that in aid of the forecasting process, the Commission looks "for clues as to risks and for evidence as to expectable performance."[23] We believe, however, that the current broad ranging character inquiry may not properly isolate those aspects of behavior which are necessarily probative as to an applicant's future conduct. In this regard, we find that future evaluations should be narrowly focused on specific traits which are predictive of an applicant's propensity to deal honestly with the Commission and comply with the Communciations Act or the Commissions rules or policies. As Citizens suggests, deregulation emphasizes the significance of the Commission's judgments regarding applicants' prospective performance.

22. Further, it does not, upon consideration of the record developed in this proceeding, appear that it is necessary to halt review of character matters as such in order to reach the objectives which were identified in the NOI and appear to be concurred in by most commenting parties: Commission consideration under "character" criteria only of matters clearly relevant to the licensing process, with that process made more equitable and efficient.[24]

23. The key factor involved in the support of some commenters for a "conduct" as opposed to a "character" standard generally appears to be the desire for elimination of the morally-tinged decision-making of the past. However, establishing a dichotomy between "conduct" and "character" is not necessary to achieve-

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[23] *Westinghouse Broadcasting Company, Inc.*, 44 FCC 2778, 2783 (1962) (hereinafter "*Westinghouse I*").

[24] As ABC notes in its reply comments, the question which emerges is not whether the Commission should confine its inquiry to relevant behavior, but what behavior is relevant.

ment of less value-laden decision-making.[25] The record developed herein clearly indicates that neither Sections 308(b) and 319(a) nor the public interest standard embodied in the Communications Act mandates the type of "good vs. bad/evil" treatment of "moral" character which sometimes colored past Commission deliberations. Focusing on the character traits necessary "to operate the station," as ABC suggests, seems a proper move in the direction of a more relevant, less value-laden character inquiry. This is the case both as to applicants who are now licensees and as to new nonbroadcaster applicants. ABC describes these traits as honesty and responsibility, for which the record indicates that the terms "truthfulness" and "reliability" might properly be substituted. Whether an applicant has or lacks these qualities is, of course, a matter which can only be addressed by considering behavior.[26] The "better way" to evaluate an applicant's future "reliability" than the sort of inquiries conducted in the past is generally identified by commenters addressing the issue as a narrowing of Commission concern to encompass only misconduct relevant to operation of broadcast stations.[27] And so a fundamental issue which the remainder of this document seeks to address is the nature of the conduct relevant to making the requisite character findings. We will be concerned with misconduct which violates the Communications Act or a Commission rule or policy, and with certain specified non-FCC misconduct which demonstrate the proclivity of an applicant to deal truthfully with the Commission and to comply with our rules and policies.

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[25] Further, it is the case that character is exemplified by conduct.

[26] We observe that deterrence is also an element of the character qualifications process, as the deterrent effect of our actions helps to ensure future reliability and truthfulness. *See FCC v. WOKO, supra* note 10, at 228. Thus, deterrence is a factor which exists within the penumbrae of the character traits with which we are concerned. *See infra* para. 103.

[27] Section 73.24(d) of the Commission's Rules, which was adopted June 30, 1939, (4 Fed. Reg. 2714, 2716), requires that an applicant for an AM station be of "good" character. Similar rules were not adopted for the other broadcast services. We will interpret Section 73.24(d) consistently with the action taken herein. We do not find, as ABC suggests, that it is necessary either to amend Section 73.24(d) or to add similar rules for the other services. It should be noted that as to our question regarding a "better way" to evaluate future reliability, some commenters, such as NCCB, contend the current policies, if clarified, would be well-suited to effectuating the Commission's proper purposes. Commenters including BML Associates ("BML"), a minority-owned consulting firm active in the communications industry, and the National Association for Better Broadcasting ("NABB") argue that the Commission should continue to be concerned with what sort of persons ought to be permitted to become "fiduciaries for the public."

B. Prediciting Applicant Reliability

1. Questions Regarding Range of Relevant Behavior

24. As to this point, it is appropriate to consider the third question raised by the Commission in the NOI:

> "(c) What types of behavior are reasonably related to predicting an applicant's future reliability as a broadcaster?"

25. The Commission set forth lengthy tentative views under this heading, concluding as an initial step that "our attention as a regulatory agency should be focused on matters directly relevant to performance as a broadcaster in the public interest." As to non-FCC misconduct, we contended that we "lack the expertise and the resources to interpret other statutes and to make value judgments about behavior unrelated to the broadcast licensing function." Thus, we solicited comment as to whether Commission considerations could be limited to "misconduct which directly affects the broadcaster's use of licensed facilities and the broadcast service to be rendered to the public as well as the Commission's ability to protect the public."

a. Existing Licensees

26. The Commission further divided the discussion into consideration of the treatment to be afforded applications involving existing licensees as differentiated from the handling of filings from new applicants. We suggested that as to existing licensees, "the best predictor of future service is the applicant's past [broadcast] service". We questioned whether in forming our judgments as to how such applicants might perform in the future our licensing concerns

> should be limited to broadcast misconduct such as misrepresentation or lack of candor to the Commission, deception or defrauding of the broadcast public, abuse of broadcast facilities through fraudulent or anticompetitive commercial practices, and violations of the Communications Act or the Commission's rules and policies.

b. New Nonlicensee Applications

27. As to new nonlicensee applicants, the primary focus of the Commission's NOI discussion was "whether any misconduct which does not involve broadcasting is relevant to our licensing responsibility and, if so, which types of misconduct are perti-

nent." The Commission remarked that we had previously "examined nonbroadcast related misconduct on the theory that it demonstrates a propensity to violate regulations designed for public protection." We stated that while we did not "doubt the appropriateness of examining *pertinent* aspects of an applicant's past history,"[28] we did question "the pertinence of most activities engaged in outside the field of broadcasting to predicting future broadcast conduct." We specifically solicited comment as to whether the current scope of the *Uniform Policy* is appropriate.

2. *Comments Regarding Range of Behavior Relevant to Applicant Reliability*

a. Existing Licensees

28. Commenters including ABC, NBC, American Family Corporation ("AFC"), Tribune, CBS, and John Blair & Company/Post-Newsweek Stations ("Blair/Post Newsweek") generally concur with the Commission's tentative decision that inquiries regarding existing licensees should focus on the applicant's broadcast record. Thus, NBC states that the Commission should limit its considerations to specific conduct which has had a substantial impact on the licensee's broadcast service, which is likely to recur and which would therefore indicate that the licensee's future service as a broadcaster would not serve the public interest. CBS proposes that the questionable behavior's impact on the broadcast audience be the key issue. CBS contends that whether a licensee has made loans at usurious rates of interest or been involved in questionable activities abroad seems to be of highly dubious relevance to the broadcast service provided to the audience. NRBA would confine the inquiry to instances of clear misrepresentation to the Commission, and to station-related misconduct only as that is relevant to future reliability. ABC would, however, make an exception to the broadcast-only rule for consideration of non-FCC misconduct "so egregious as to preclude a continued finding that the applicant is honest and reliable."[29]

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[28] Citing *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D. C. Cir. 1950).

[29] ABC states in support of this exception that if "character" were absolutely limited to broadcast performance, "a licensee could, for example, assassinate the President of the United States and still receive a regular renewal if no defect were found in its station operations." ABC argues that "[s]uch a result would be outrageous." A related stance is taken by BML which suggests that the Commission at the least should consider the fact that an applicant is "a murderer, or a terrorist, or had been convicted of felonies involving moral turpitude."

29. A different position on the issue is taken by parties including NCCB, UCC and the Committee for Community Access ("CCA"). They contend that both broadcast and nonbroadcast behavior is relevant to the degree such behavior raises questions about an applicant's ability to serve the public interest. UCC further states that in examining nonbroadcast conduct, the Commission should not be bound by the determinations of other forums, which may have nothing to do with the scheme of broadcast regulation. Citizens, NBMC and NCCB argue that Commission and various parties have overstated the difficulties and flaws inherent in implementation of our traditional system of character review.

b. New Nonlicensee Applicants

30. Comment regarding the consideration of nonbroadcast misconduct in cases involving new nonlicensee applicants was quite diverse. ABC and CBS see the need to make predictive judgments as requiring some scrutiny of nonbroadcast activity. Citizens and UCC argue that such inquiries are needed because, *inter alia*, an initial evaluation of character cannot be replaced by forfeiture or revocation proceedings, which are too complex and place too heavy a burden on the Commission. NAB contends that such inquiry should be confined in scope if the Commission feels compelled to conduct it. NAB would limit consideration of the nonbroadcast activities of new applicants to adjudicated felony convictions (which would not be automatically disqualifying). NAB observes that there is substantial ground for a presumption of reliability to be accorded to any applicant, absent serious indications to the contrary. Blair/Post-Newsweek take the position that since wrongdoing in nonbroadcast affairs is not necessarily predictive of service to the public, the burden should be on the party asserting that a character defect inheres in such behavior to make the connection. We are of the view that the range of non-FCC behavior should be the same for both new nonbroadcaster applicants and incumbent licensees/permittees.

3. Conclusions on Range of Relevant Non-FCC Behavior

31. A character qualification established by government "must have a rational connection with the applicant's fitness" to do the thing sought to be done.[30] Our consideration of the record

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[30] *Schware v. Board of Bar Examiners of New Mexico*, 353 U. S. 232, 239 (1957).

developed herein, together with our experience in administering the *Uniform Policy* for more than three decades, leads us to the conclusion that the necessary "rational connection" cannot be found in many of the types of situations as to which the Commission has over the years considered the non-FCC misconduct of its broadcast applicants.

32. In the *Uniform Policy*, the Commission stated that "pertinent aspects of the past hisotry of the applicant"[31] would "clearly include any violation of Federal law," noting that we had in the past considered such conduct as "violations of Internal Revenue laws, conspiracy to violate antitrust laws, false advertising and other deceptive practices." The Commission held that it was "irrelevant to a determination of qualifications whether the finding of violation is in a civil or criminal case," that no significance was to be awarded to the nature of the tribunal making the finding, and that even if no suit has been filed, or a suit filed but not heard or finally adjudicated, "the Commission may consider and evaluate the conduct of an applicant in so far as it may relate to matters entrusted to the Commission."

33. Through the years, the Commission has generally declined "to explore matters currently being litigated before the courts or to duplicate the ongoing investigative efforts of other government agencies charged with the responsibility of interpreting and enforcing the law in question."[32] Nonetheless, we have been led to consider an incredible range of non-FCC behavior.[33] Even egre-

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[31] Citing *Mansfield Journal Co. v. FCC, supra* note 28.

[32] *Revision of FCC 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, 59 FCC 2d 750, 763 (1976). For a recent review of our practice in this regard, *See Alan K. Levin*, FCC 84R-18, 55 R.R.2d 981 (Rev. Bd. 1984) (dictum), *rev denied* FCC 85-130, *appeal pending sub nom. Levin v. FCC*, No. 85-1255 (D.C. Cir. 1985).

[33] *See* e. g. *KCOP*, 37 RR2d 1051 (1976) recon. denied 39 RR 2d 965 (whether wrestling matches violate state law is for the State Athletic Commission to decide); *Kaiser Broadcasting Corporation*, 31 RR 2d 46 (1974) (conviction of applicant for antitrust violations relying on past decisions of legality then overruled was not disqualifying); *Sande Broadcasting Corporation*, 38 RR 2d 685 (1976) (criminal acts of shareholder did not require hearing where shareholder not involved in daily operations and removed from corporation prior to felony conviction); *Sunshine Wireless, Inc.*, 45 RR2d 1699 (1979) (five year old National Labor Relations board findings of failure to bargain do not impact renewal); *Abbey J. Butler*, 47 RR 2d 852 (1980) (grant without hearing denied where one transferee had signed securities law consent order, other transferee denied membership on a commodities exchange); *Tri-Cities Broadcasting*, 4 RR 2d 642 (Rev. Bd. 1965) (judgment against 10% shareholder for nonpayment of rent not conduct related to matters entrusted to the Commission); *D&E Broadcasting Co.*, 4 RR 2d 791 (Rev. Bd. 1965), 5 RR 2d 745 (1965) (whether or not applicant knowingly imported three horses into U.S. in violation of Tariff Act, the duty involved is only $19.50, he's not disqualified,

gious non-FCC misconduct, however, has apparently not in itself been found to disquality existing licensees, at least in the renewal context.[34] Thus Commission resources, and those of our applicants, have been spent in proceedings sometimes spanning decades, considering matters which, in any event, are not of themselves dispositive of action to be taken. Having fully considered the record on this matter as developed herein, and our experience with the *Uniform Policy*, we do not believe that the level of review of non-FCC misconduct called for by the *Uniform Policy* is justified.[35]

34. We believe that the non-FCC behavior of concern to us is that which allows us to predict whether an applicant has or lacks the character traits of "truthfulness" and "reliability" that we have found relevant to the qualifications to operate a broadcast station in accordance with the requirements of the Communications Act and of our rules and policies. Based on the record before us, we find it appropriate to focus generally on three types of adjudicated misconduct which are not specifically proscribed by the Act or our rules and policies: (1) fraudulent statements to government agencies; (2) certain criminal convictions; and (3) violations of broadcast related anti-competitive and antitrust statutes.

a. Fraudulent misconduct before a government agency

35. The concepts of "truthfulness" and "reliability" are, of course, closely related, as reliability includes the propensity to act consistent with one's representations. Thus, in the NOI the Commission noted that when it had "believed that an applicant's general integrity and future reliability were in doubt due to its past misrepresentations or lack of candor, the Commission has

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but matter will be considered in comparative proceeding); *Bangor Broadcasting Corporation*, 23 RR 2d 883 (Rev. Bd. 1972) (Commission won't add issue as to possible unadjudicated violation of wage/price freeze); *Kenneth Harrison*, 35 RR 2d 911 (1975) (alleged state liquor law violations a matter for state courts).

[34] *RKO General, Inc., supra* note 9, at 49, *aff'd, RKO General, Inc. v. FCC, supra* note 8, at 227. *See, also, Westinghouse I, supra* note 23; *General Electric Co.*, 45 FCC 1592 (1964); *Westinghouse Broadcasting Company*, 75 FCC 2d 736 (1980) (hereinafter "*Westinghouse II*"); *Miami Valley Broadcasting Corporation*, 78 FCC2d 684, 721-761 (1980), *vacated on other grounds*, 48 RR 2d 1065 (1980).

[35] We are not alone in holding such a viewpoint. *See*, for example, *Wilkett v. Interstate Commerce Commission*, 710 F.2d 861, 863-864 (D.C. Cir. 1983) (conviction of sole proprietor of trucking company for conspiracy to distribute a controlled substance and second degree murder no bar to determination that his company is fit to conduct motor carrier operations).

denied the application before it."[36] We have recently observed that misrepresentation "involves false statements of fact," while lack of candor "involves concealment, evasion, and other failures to be fully informative." However, we concluded that both misrepresentation and lack of candor "represent deceit; they differ only in form."[37] Deceit is equated with fraud.[38]

36. As we have noted, we do not believe that as a general matter non-FCC violations of law have sufficient relationship to the likelihood that an applicant will or will not in the future operate a broadcast station in compliance with the Commission's rules that these violations, adjudicated or not, should be considered in determinations on applicant qualifications. We are of the view, however, that there may be a sufficient nexus between fraudulent representations to another governmental unit and the possibility that an applicant might engage in similar behavior in its dealings with the Commission that non-FCC actions involving such behavior may be considered as having a potential bearing on character qualifications.[39] In this context, adjudications of both criminal and civil violations of law could be considered in which a specific finding of fraudulent representation to another governmental unit is made.

b. Criminal convictions

37. We also recognize that other types of non-FCC behavior may potentially bear on an applicant's character. In this regard, we believe that criminal convictions involving false statement or dishonesty could be relevant to predicting the propensity for an applicant to deal truthfully with the Commission.[40] Beyond

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[36] NOI, *supra* note 1, at 847.

[37] *Fox River Boradcasting Company, Inc.*, 93 FCC 2d 127, 129 (1983).

[38] *Webster's New Collegiate Dictionary* 453 (1979). *See, also*, *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454, 461–462 (D. C. Cir. 1980). AS to our action herein regarding the future treatment ofmisrepresentation or lack of candor to the Commission, *see infra* paras. 58–61.

[39] "Fraud connotes perjury, falsification, concealment, misrepresentation." *United States v. Nill*, 518 F.2d 793 (5th Cir. 1975), citing *Knauer v. United States*, 328 U.S. 654 (1946).

[40] We find that Rule 609 of the Federal Rules of Evidence is useful in identifying specific types of criminal misconduct which may be relevant to an applicant's character for truthfulness. While this rule is directed at the types of criminal behavior which may be used for witness impeachment purposes, we find it instructive in analyzing aspects of character relating to truthfulness and reliability in our regulatory scheme. Specifically, Rule 609(a)(2) permits the introduction of any criminal convictions, regardless of punishment, involving dishonesty such as perjury, criminal fraud and embezzlement. *See* Fed. R. Evid. 609(a)(2). We find this approach appropriate for our purposes.

convictions of crimes involving dishonesty, we also find that other serious crimes maybe potentially relevant in determining character qualifications. We are of the view, however, that criminal convictions not involving fraudulent conduct are generally not relevent to an applicant's propensity for truthfulness and reliability,[41] unless it can be demonstrated that there is a substantial relationship between the criminal conviction and the applicant's proclivity to be truthful or comply with the Commission's rules and policies.[42] In this regard we find it appropriate to consider only felony convictions. The burden of proving that a substantial relationship exists shall be on the party seeking admission of such evidence. We believe that this strict standard properly balances our concerns with the probity of such evidence and our need to reduce unnecessary administrative delay in the hearing process.

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[41] *See Leflore-Dixie, Inc.*, FCC 85R-19, Mimeo No. 2864, released March 4, 1985, (Rev. Bd.) (no nexus shown between one principals' prior felony conviction of obtaining diet pills by using a forged physician's signature and applicant's current qualifications; and allegations of drug use by another principal did not warrant a hearing issue because no criminal proceeding had been instituted and no showing had been made that the past behavior had any predictive value in ascertaining the applicant's ability to comply with Commission rules); *Alessandro Broadcasting Co.* 56 RR 2d 1568, 1575 n. 13 (Rev. Bd. 1984) (conviction for second degree murder by an applicant's controlling shareholder did not warrant either disqualification or assessment of a substantial comparative demerit; since incident was remote in time and the individual was completely rehabilitated under local law, there was no predictive nexus between his past crime and his future fitness to be a Commission licensee); and *Central Texas Broadcasting Co.*, 51 RR 2d 1478, 1485-86 (Rev. Bd. 1982) (alleged violations of a state usury law and the Federal Age Discrimination Law, as well as a plea of *nolo contendere* to an indictment charging conspiracy to violate the federal antitrust laws, did not justify assessment of comparative demerits to competing applicants for a new TV station).

[42] We believe that our approach here is somewhat analogous to that found in section 609(a)(1) of the Federal Rules of Evidence. Pursuant to this rule, criminal felony convictions may be admissible only where the probative value of the evidence outweighs the prejudicial effect to a criminal defendant. In this regard, the Federal Rules recognize that the probative value of this type of evidence may not be sufficient to outweigh competing policy concerns in all situations. While proceedings before the Commission do not involve the rights of criminal defendants, other policy concerns such as undue delay, waste of administrative resources resulting from the presentation of evidence not directly applicable to our regulatory concerns justify our action herein. *See e. g.* Fed. R. Evid. 403. Our experience with criminal felony convictions that do not involve fraud or dishonesty persuades us that a strict examination of the relationship between the conviction and an applicant's propensity for truthfulness be conducted prior to designating a basic character qualifications issue for hearing. *See Alessandro Broadcasting Co. supra* note 41. In considering the threshold relevancy of these convictions, the Commission will evaluate factors such as the nature of the crime, its nearness or remoteness, and whether the individual has been rehabilitated. *See, e. g., Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967).

c. Antritrust and Anticompetitive Commercial Practices

i. Issues

38. Another area as to which we inquired in the NOI was the proper treatment of misconduct by existing licensees in the form of fraudulent or anticompetitive station-related commercial practices. The Commission observed that we had historically been concerned with such unfair or fraudulent commercial practices as fraudulent billing, misleading coverage maps and network program clipping. These infractions, we remarked, "adversely affect a licensee's sponsors or business partners rather than the listening public." Thus, we contended, "a cogent argument can be made that such commerical misconduct should be left to private remedies in contract law or criminal fraud prosecution and that this Commission, with its limited resources, should not involve itself in policing these activities." The Commission suggested, however, that in an era of increasing reliance on marketplace forces to achieve public interest goals, fraud which negatively affects the marketplace might be a proper matter of consideration. Similarly, the Commission stated, "traditional anticompetitive behavior can have serious adverse consequences on the Commission's ability to rely on the comptitive marketplace." An applicant engaging in station-related anticompetitive conduct might undercut the Commission's traditional goal of diversity in information resulting from diversity of ownership.

ii. Comments

39. In this area, such commenters as CBS, NBC and ABC generally support relaxation of Commission consideration of both fraudulent commercial practices and anticompetitive commercial practices as matters affecting qualifications. ABC states that as a result of the Commission's approach to character, we have considered "a host of allegations" concerning violations of law unrelated to the Communications Act or our rules without ever inquiring, as a threshold matter, as to the relevance of such infractions to the likelihood that the applicant will be honest in its dealings with the Commission and operate its broadcast facility consistent with the Communications Act and Commission rules and policies. CBS argues that "however reprehensible certain commercial practices may be, they primarily affect a

licensee's advertisers and business partners," and not what listeners and viewers hear and see. CBS and NBC state that ample remedies, both private and governmental, are available to deter such misconduct.

40. Additionally, CBS argues that the marketplace will provide a significant deterrent to fraudulent business practices. For example, CBS states that with numerous broadcast and nonbroadcast media outlets available, advertisers will not long deal with stations engaged in fraudulent billing. NBC argues that as to anticompetitive practices, the Commission "has every reason to rely on the operation of the marketplace," as supplemented by the agencies and courts directly responsible for policing such practices. NBC comments that "[t]he basic assumption supporting deregulation is not that anticompetitive activity will never take place, but rather that the marketplace is generally competitively structured and will function properly in a system of competitive free enterprise."

41. In opposition to changing our present practices, commenters including Citizens, NCCB and BML contend that licensees involved in fraudulent commercial practices such as double billing are not living up to the high commercial standards expected of "fiduciaries for the public." Citizens argues that licensees who engage in such practices are "more likely to misrepresent and disobey laws in other areas that more directly impact the public." As to anticompetitive practices, Citizens states that the policy which has been established in the Communications Act and by the Commission and the courts[43] requires that applicants who have engaged in anticompetitive conduct in both broadcast and nonbroadcast areas "be scruntinized with extreme care for any propensity to duplicate such conduct as a broadcast licensee." Such propensity, states NCCB, "is especially incompatible with broadcasting in the public interest." Blair-Post/Newsweek state that practices such as fraudulent billing and network clipping, although they may affect parties other than the broadcast audience, can affect the public as well, as when network clipping removes a required sponsorship identification announcement. Blair-Post/Newsweek contend that as to certain "gray area" practices which may or may not relate to program performance,

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[43] *Citing, inter alia, National Broadcasting Company v. United States*, 319 U.S. 190, 222–224 (1943); *Metropolitan Television Company v. FCC*, 289 F.2d 874, 876 (D.C. Cir. 1961); *Mansfield Journal Co. v. FCC*, *supra* note 28, at 33; Section 313 of the Communications Act of 1934, as amended; and "the legislative history of the Radio Act of 1927 and the Communications Act of 1934."

(and given "good faith doubt as to whether particular practices do reflect on broadcast qualifications"), the Commission should take cognizance only of those practices which have been "designated in rules, policy statements or adjudications as being relevant to evaluation of a renewal application."

iii. Conclusions Regarding Antitrust and Anticompetitive Commercial Practices

42. Initially, we are of the view that our examination of nonbroadcast commercial activity in the character context should be substantially revised.[44] Current policies require consideration of business activity that extends far beyond our specific regulatory concerns.[45] As we have observed previously, we no longer believe it appropriate to require the level of review of non-FCC activity currently required by the *Uniform Policy Statement.*[46] We find this analysis particularly persuasive in the context of nonbroadcast business misconduct, where the policies, concerns, and market incentives in other industries may be quite different from the broadcast industry. In this regard, anticompetitive activity in the nonbroadcasting context may not be predictive of an applicant's proclivity to be truthful and reliable.[47] Moreover, there is nothing in the Communications Act requiring a consideration of nonbroadcast related commerical activity in the context of our character determinations. In this regard, even adjudicated cases of anticompetitive activity, antitrust violations, or other types of nonbroadcast business misconduct would not necessarily be relevant to our specific concerns for truthfulness and reliability in the operation of a broadcast station.[48] Accordingly, with

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[44] In this context non-broadcast activity describes business conduct which is not directly related to the business of broadcasting. Alternatively, broadcast related activity describes commerical activity which occurs in the course of operating or running a broadcast station.

[45] *See Uniform Policy Statement, supra* note 6, at 404. Indeed, the Commission's concerns with the monopolistic practice in other industries appears to have been originally founded on specific concerns with the monopolistic practices of the motion picture industry and its effect on the newly emerging television industry. *Id.* Such concerns are no longer appropriate in the current communications marketplace.

[46] *See supra* text at para. 33.

[47] The lack of predictability of nonbroadcast anticompetitive activity was amply demonstrated in the Commission's *Westinghouse I* decision. *See Westinghouse I, supra* note 23.

[48] We recognize our obligations pursuant to Section 313(b) of the Act relative to refuse a license or construction permit to applicants whose license has been revoked by the courts for antitrust violations. This section, however, does not require consideration of nonbroadcast antitrust activity in the character

respect to nonbroadcast related activity, we shall limit our character inquiry to those adjudicated violations discussed previously.[49]

43. We believe that where broadcast related business misconduct rises to the level of an adjudicated violation of their anticompetitive or antitrust laws, then the Commission could consider the activity relevant to an applicant's character. Generally, where alleged anticompetitive activity does not constitute a violation of state or federal antitrust or anticompetitive laws we will not pursue the matter. Unless the Commission has adopted a specific rule or policy prohibiting the commerical conduct at issue, we think licensees should not be penalized for engaging in activities that meet the requirements of law and that such conduct does not reflect upon their character. Although we once believed that the public interest standard warranted imposition of standards more stringent than those imposed by the antitrust laws, we no longer believe it is necessary to pursue matters that Congress itself has not seen fit to prohibit. For the most part, we believe that the potential to engage in monopolistic and anticompetitive practices is circumscribed in today's competitive market. However, we not that concerns with anticompetitive and antitrust activity in broadcasting have occupied a unique position in the Commission's regulatory scheme.[50] These concerns have been expressed not only in the context of specific rules, but also as elements in those areas involving discretionary determinations by the Commission.[51] Because of this unique position, violations

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context where a court has failed to revoke an applicant's license. In this regard, we note that the Commission's primary responsibility has always been to promote competition in the broadcast industry. *See* 47 U.S.C. § 313(a)(1984) (all laws of United States relating to unlawful restraints and monopolies are applicable to radio); 47 U.S.C. § 311 (1950) *amended* Pub. L. No. 554, 66 Stat. 711 (1952) (section formerly required Commission to refuse to grant a license to any applicant found guilty by a Federal Court to have unlawfully monopolized radio communication even where the court did not revoke a license); 15 U.S.C. § 21 (granting authority to the Commission to enforce compliance with the Clayton Act where applicable to common carriers engaged in radio transmission of energy).

[49] *See supra* paras. 35-37.

[50] Indeed, concerns over potential monopolistic practices in broadcasting were a significant force behind the Communications Act and subsequent regulatory policies. *See e.g., National Broadcasting Co. v. U.S.* 319 U.S. 190, 222-224 (1943). *See also*: *Memorandum Opinion and Order* in Gen. Doc. 83-1009, 100 FCC 2d 74 (1985) (discussing competitive concerns in the rule making context).

[51] For example, in 1952 Congress amended § 311 of the Communications Act by striking language which had previously authorized the Commission to revoke a license where a licensee was found to be guilty of violating the antitrust laws regardless of whether the court ordered such revocation. In eliminating this provision, Congress noted that the Commission's authority to examine anti-

of anticompetitive and or antitrust laws in the broadcast context may have a potential bearing on an applicant's proclivity to comply with the Commission's rules and policies. As a result, we believe it is appropriate to distinguish broadcast related antitrust and anticompetitive behavior from other types of business misconduct for the purposes of determining an applicant's basic character qualifications.[52]

44. While such activity may have a potential bearing on the applicant's character, we do not believe it appropriate or necessary to engage in the initial investigation or enforcement of the antitrust laws.[53] As we have observed in the *Underbrush* proceedings, other government agencies — most notably the Department of Justice and the Federal Trade Commission — have been given primary responsibility in policing antitrust and anti-competitive activity.[54] In addition, individuals or corporations can bring lawsuits alleging violation of antitrust or anticompetitive laws. In this regard, we are of the view that, for the purposes of a character determination, consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with the responsibility of policing such activity.[55] We find that this approach strikes an

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trust activity in the character context was not changed by the amendment. *See* Sen. Rep. No. 44, 82 Cong. 1st Sess., January 25, 1951; *Communications Act Amendments*, Pub. L. No. 554, 66 Stat. 711 (1952).

[52] We recognize, of course, that our consideration of antitrust or anticompetitive violations in the context of broadcasting differs from the policy considerations which arise with antitrust or anticompetitive violations of other Commission licensees. In this regard, the policy concerns regarding tariffs and rate making may justify different treatment of these issues. *See* e.g. *Notice of Proposed Rulemaking*, in CC Docket No. 85-64, FCC 85-120, released May 3, 1985. Moreover, the Commission has recognized that the policies generally underlying our character inquiry in the broadcasting context are different from those which are raised in the common carrier context. *See Arizona Mobile Telephone Co.*, FCC 83-557, 52 RR 2d 1001, 1017-1018 (April 13, 1983). (Character considerations involving tax liens and judgments do not bear the same significance for CARs carriers as they would in broadcast proceedings).

[53] While the Commission has the authority to investigate anticompetitive activity which falls short of an adjudicated violation of the antitrust or anticompetitive laws, *See e.g.*, *U.S. v. RCA*, 358 U.S. 334 (1954); *Philco Corp. v. FCC*, 293 F.2d 864 (1961), we do not believe that independent consideration of such misconduct is required by the Communications Act prior to an adjudication before an appropriate forum. We believe these decisions must be considered in the context of the Commission's regulatory posture at that time. In this regard, we view the Court's statements concerning consideration of unadjudicated antitrust allegations as affirming the Commission's previous regulatory scheme and not as a statutory requirement.

[54] *See infra* para. 45.

[55] In this regard, we note that our consideration will include violations of the

appropriate balance between the need to consider the relevancy of such activity, our desire not to duplicate the adjudicative functions of the courts of other government agencies and our concern with the basic fairness of our proceedings to participating litigants.

d. Underbrush considerations

45. In the past several years, the Commission has undertaken, in its broadcast "Underbrush" proceeding in MM Docket 83-842,[56] a systematic review of those policies and rules which were "no longer warranted or required by the public interest." In eliminating certain of these policies the Commission stated that it would no longer consider certain areas of misconduct in the first instances but rather that such matters should be treated by more appropriate governmental agencies or the courts. In so doing, however, the Commission acknowledged that it may consider the impact of adverse agency or judicial findings regarding the practices in question upon an applicant's character qualifications[57] and, further, left open to this instant character proceeding the ultimate effect to be given to any such adverse adjudications

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Sherman Antitrust Act, Clayton Antitrust Act, Robinson-Patman Act, Federal Trade Commission Act as well as similar state antitrust and anticompetitive statutes.

[56] *See, generally, Elimination of Unnecessary Broadcast Regulation*, FCC 83-339, 48 Fed. Reg. 36254 (August 10, 1983) (hereinafter *Underbrush* I); *Elimination of Unnecessary Broadcast Regulation and Inquiry into Subscription Agreements Between Radio Broadcast Stations and Music Format Companies*, MM Docket No. 83-842 and No. 19743; FCC 83-375, 48 Fed. Reg. 49852 (October 28, 1983) (hereinafter *Underbrush II*); *Notice of Proposed Rule Making* in MM Docket No. 83-842, FCC 83-376, 48 Fed. Reg. 49879 (October 28, 1983); *Report and Order* in MM Docket No. 83-842, FCC-388, 49 Fed. Reg. 33264 (August 22, 1984) (hereinafter *Underbrush III*); *Policy Statement and Order* in MM Docket No. 83-842, FCC 85-24, 50 Fed. Reg. 6264 (February 14, 1985) (hereinafter *Underbrush IV*); *Policy Statement and Order* in MM Docket No. 83-842, FCC 85-25, 50 Fed. Reg. 5583 (February 11, 1985) hereinafter *Underbrush V*); and *Second Notice of Proposed Rule Making* in MM Docket No. 83-842, FCC 85-26, 50 Fed. Reg. 5792 (February 12, 1985) (hereinafter *Underbrush VI*).

[57] Examples of formerly proscribed activity which could possibly result in adjudications by other tribunals would be improper use of coverage maps (formerly Sec. 73.4090); improper use or distortion or audience ratings (formerly Secs. 73.4035 and 73.4040); promotion of nonbroadcast business (formerly Sec. 73.4225); etc. We note, however, that not all of the policies eliminated in the Underbrush proceedings would necessarily trigger liability under other laws, in that they were FCC-created and have no counterparts in other laws. For example, elimination of our policies with respect to foreign language broadcasts, music format service agreements, repetitious broadcasts, off network programs, polls and sirens or sound effects in advertising would not generally trigger liability under other laws. *See Underbrush II.*

involving once proscribed activities.[58]

46. Accordingly, we shall here set forth our conclusion with respect to this matter. Engaging in underbrush type activities may give rise to various causes of actions both civil and criminal. We do not find it necessary or appropriate to expand upon the range of relevant non-FCC behavior described above. Because engaging in those activities are no longer specifically proscribed by our policies, we will consider the misconduct as being relevant to an applicant's character qualifications only where there has been an adjudication and that adjudication falls into one of the above described categories of non FCC behavior. For example, engaging in ratings distortion could be considered relevant to an applicant's character to the extent that it rose to the level of an adjudicated violation of the antitrust or anticompetitive laws. Such activity may also be considered if it resulted in a criminal conviction or an adjudication of fraud before another government agency. Of course where such activity constitutes a violation of existing rules and policies then such misconduct would be considered as FCC related behavior.

47. If in the future the Commission decides to eliminate policies relating to business practices, than at that time, such practices would be treated no differently than other non-FCC misconduct for character purposes. We do not believe any parties have made a showing that broadcasters should be subject to extraordinary penalties through the licensing process absent a Commission finding that our direct control of such practices is necessary to the regulatory scheme.[59]

e. Other matters concerning non FCC misconduct

48. It is our current practice to ordinarily to refrain from taking any action on non-FCC misconduct prior to adjudication by

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[58] In this connection, *see, also*, *Amendment of Section 73.1202(b)(2) of the Commission's Rules — Additional City Identification*, 48 Fed. Reg. 51302 (1983), at paragraph 13, n. 6.

[59] At the present time, the Commission has before it a *Second Notice of Proposed Rulemaking* involving its rules concerning fraudulent billing, network clipping and joint sales policies. *See Second Notice of Proposed Rulemaking* in MM Docket No. 83-842, FCC 85-26, 50 Fed. Reg. 5792 (February 12, 1985). Thus, participating in these types of misconduct would be considered as FCC related behavior. However, if these specific directives were eliminated, then such misconduct could be relevant to an applicant's character only to the extent that it falls into one of the specific categories of non-FCC behavior described above. The present proceeding in no way prejudges the outcome of this pending matter.

another agency or court.[60] In the future, our current practice will be our actual policy. We will not take cognizance of non-FCC misconduct involving criminally fraudulent misrepresentations, alleged criminal activity and antitrust or anticompetitive misconduct unless it is adjudicated.[61] In this regard, there must be an ultimate adjudication by an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations.[62] Such adjudications will be considered for character purposes during the pendency of an appeal.[63] In addition, consent degrees will not be considered as adjudicated misconduct for the purposes of assessing an applicant's character.[64] Finally, we will not take cognizance of these adjudicated non-FCC acts as to any individual or entity whose ownership or positional interest in an applicant is not cognizable under our multiple ownership rules. Those interests which are believed by the Commission to have the potential to influence or control the operations of a station are recognized and attributed under the multiple ownership rules. We see no reason to consider as bearing on character qualifications the participation in an applicant of an individual or entity whose stake in the applicant is otherwise seen as inconsequential with regard to the potential to influence station operations.

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[60] The Commission acknowledges that there may be circumstances in which an applicant has engaged in nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation. *See e.g., supra,* comments of ABC at note 29. Such misconduct might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee, and might be a matter of Commission concern even prior to adjudication by another body. The Commission cannot presently contemplate the manner in which circumstances might arise, and stresses that such considerations would come into play only with regard to a specific application involving specific misconduct.

[61] The Commission recognizes that there may be circumstances in which an applicant has engaged in repeated, willful violation of law amounting to a flagrant disregard for complying with the law. Such adjudicated misconduct might, of its own nature, provide sufficient evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee. In the rare instances where the Commission is confronted with such a record, consideration should be given to the circumstances surrounding the violations. In this regard, we believe that not only must there be a pattern of adjudicated violations, but the types of violations must reflect a significant departure from established legal authority. Moreover, the applicant must have either actual knowledge that the conduct constitutes a clear violation of existing law or the nature of the violation itself must give rise to a irrefutable inference that the applicant knew it was violating the law. In making these determinations it may be appropriate to consider whether the violation resulted from an incorrect legal interpretation or whether the violation represented a knowing decision to ignore legal authority.

[62] We believe it appropriate to consider only those adjudications made by an ultimate trier of fact. Tribunals whose factual determinations may be reviewed *de novo* will not be considered unless the time for taking such review has expired under the relevant procedural rules.

[63] In the appropriate circumstances, we may condition any Commission action on the outcome of an appeal. The impact of an appeal on an applicant's character determination will depend, *inter alia,* on a consideration of the issues which are the subject matter of the appeal. *See* Fed. R. Evid. 609(e).

[64] We do not believe it appropriate to consider consent decrees, entered into in the civil context, for the purpose of determining character qualifications. The act of consenting to such an agreement is not a wrongful act and does not necessarily imply wrongful conduct. The existence of a consent decree, by itself, is not necessarily probative on the issue of an applicant's character. *See Katy Communications* 87 FCC 2d 764 (1984). With regard to convictions based on a

49. The Commission finds no basis upon which to treat new nonlicensee applicants differently than existing broadcasters with regard to the scope of consideration given non-FCC misconduct.[65] We do not believe it reasonable to go beyond the above mentioned limits and treat other misconduct which we have deemed irrelevant to the character qualifications of existing broadcasters as bearing upon the character of new nonlicensee applicants simply because no other evidence is available. Thus, the same policy will apply to new nonbroadcaster applicants as to existing broadcasters. While the Commission understands Citizens' and UCC's concerns regarding the complexity of forfeiture and revocation proceedings, we conclude that the costs imposed by such proceedings in the limited instances in which they might be found necessary are clearly outweighed by the benefits of avoiding regular, inappropriate reviews of an applicant's non-FCC misconduct. In this regard, we believe that our revocation proceedings will serve as an appropriate remedy in those situations where the misconduct has been adjudicated.[66] We note that the processing of the errant broadcaster's first renewal application will also afford the opportunity to consider any problems in broadcaster operations. Given that we will continue to consider adjudicated non-FCC misconduct as to both new applicants and existing broadcasters before a government agency, we will not at this time

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plea of *nolo contendere*, however, we are of the view that such convictions could be considered relevant for the purposes of our character examination. *See U.S. v. Williams*, 642 F.2d 136 (5th Cir. 1981).

[65] While the scope of relevant non-FCC behavior is the same for both new licensees and existing broadcasters, the ultimate significance of such misconduct may be different. For example, an incumbent's past record of compliance with our rules may, in certain circumstances, be balanced against any non-FCC misconduct. *See infra* at para. 102.

[66] Our focus on adjudicated misconduct does not limit the Commission's discretion to condition the grant of a license or permit on the outcome of related court or government agency proceeding, where such action is deemed appropriate.

delete from Commission broadcast application forms all questions regarding adjudicated non-FCC misconduct. The questions will, however, be appropriately modified.

50. In taking action herein, we are mindful of the *dicta* in *Community Television of Southern California v. Gottfried*[67] in which the Court suggested that the Commission would be obligated to consider the possible relevance of an adjudicated violation of *any* Federal statute by a licensee "in determining whether or not to renew the lawbreaker's license." In making this statement, the Court referred to the Commission's own explanation of our past policy. It therefore appears that the Court's statement is reflective of our policy rather than a definitive judicial determination that such Commission review is required. Similarly, we are aware that cases such as *TV-9, Inc. v. FCC*,[68] suggest that basic character qualifications may be put in issue even by unadjudicated violations of [criminal] law. We find merit to the view expressed in NAB's comments that the Court's statement in *TV-9* was made "in the context of the Commission's traditional policies on character qualifications," and was not an adjudication of whether the Communications Act permits or warrants new and different policies. We view related judicial holdings in a similar manner.[69] The propriety of making changes in the manner in which the Commission exercises its authority in the licensing process has long been recognized by the Courts, it being acknowledged that "experience often dictates change."[70]

51. While it has been held that "an agency charged with promoting the 'public interest' in a particular substantive area may not simply 'ignore' the policies underlying other federal statutes,"[71] it has also been determined that "the use of the term 'public interest' in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purpose of the regulatory legislation."[72] Thus, while it may be appropriate for the Commission to consider the relationship of the policies underlying other Federal statutes to effectuation of the policies behind the Communications Act, the inclusion

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[67] 459 U.S. 498, 103 S. Ct. 885, 74 L. Ed. 2d 705, 716 (1983).

[68] 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

[69] *See*, for example, *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 45, 52 (D.C. Cir. 1978) ("*Central Flordia I*").

[70] *Pinellas Broadcasting Company v. FCC, supra*, note 18 at 206.

[71] *McLean Trucking Co. v. United States*, 321 U.S. 67, 80 (1944), as discussed in *Community Television of Southern California v. Gottfried, supra* note 67, at 716.

[72] *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669 (1976) (hereinafter "*NAACP v. FPC*").

of a public interest standard in the Communications Act did not automatically given the Commission "either the authority or the duty to execute numerous other laws."[73]

52. As a general proposition it is clear that we have the discretion to decide whether to approach these matters through rulemaking, individual adjudication, or a combination of the two.[74] Issuance of the instant *Policy Statement* as guidance certainly falls within the bounds of this discretion. Thus, it appears fully within our authority to determine in the instant proceeding that only a relatively focused inquiry of non-FCC misconduct will be considered in the future as bearing on character qualifications, and that such misconduct must have been adjudicated by an appropriate agency or court before Commission consideration will occur. It is our determination that it is this range of non-FCC misconduct which, for character qualifications purposes, is relevant to the regulatory purposes of the Communications Act.[75]

4. Issues Regarding FCC-Related Misconduct

53. In the previous section of this document, we discussed the types of non-FCC misconduct which might be considered as raising questions regarding an applicant's character qualifications. Attention must also be given to the manner in which FCC-related misconduct of those with a record as licensees will be treated for qualifications purposes.

a. Violations of the Communications Act, Commission Rules and Policies

54. In the past, the Commission has in its decisions described the import of violations of the Communications Act or our rules and policies other than those bearing on citizenship and technical qualifications in several different ways. While some infractions have in fact been discussed as bearing on "character qualifications", others have been described as having an impact on the applicant's fitness." Some violations have been said to bear on

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[73] *Id.*

[74] *See SEC v. Chenery Corp.*, 332 U.S. 194, 202–203 (1947).

[75] This is not to say that the Commission will not consider the relationship to the Communications Act of other Federal statutes not involving such misconduct, but only that such considerations should ordinarily occur in the rulemaking context rather than in the contemplation of character qualifications issues in individual cases. Should our future experience indicate that we have erred herein in narrowing the range or non-FCC misconduct to be considered for character purposes, we would of course be prepared to revisit this issue.

"qualifications," but the type of qualifications in question has been left unidentified.

55. In this *Policy Statement*, the Commission has determined that the relevant character traits with which it is concerned are those of "truthfulness" and "reliability." Regardless of the manner in which we have historically described the matters before us, our concerns when reviewing FCC-related misconduct in the licensing context have clearly had a relationship to those two traits; we have questioned whether the licensee will in the future be likely to be forthright in its dealings with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's Rules and policies.

56. From this perspective, it appears that as a general matter any violations of the Communications Act, Commission rules or Commission policies can be said to have a potential bearing on character qualifications. As noted in paragraph 26, *supra*, in the NOI we specifically solicited comment as to whether violations of the Act or our rules or policies should bear on the qualifications of existing licensees. The thrust of the comments received is that these are matters which are predictive of licensee behavior and directly relevant to the Commission's regulatory activities. Thus, we will in the future treat violations of the Communications Act, Commission rules or Commission policies as having a potential bearing on character qualifications.

57. As indicated in paragraph 26, *supra*, in the NOI we also raised specific questions as to whether such FCC-related misconduct as "misrepresentation or lack of candor to the Commission, deception or defrauding of the broadcast public, and abuse of broadcast facilities through fraudulent or anticompetitive commercial practices" should be considered as qualifications issues bearing on an applicant's likely future broadcast performance. We believe it appropriate to give misrepresentation specific consideration in the context of this *Policy Statement*. The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission. Other types of FCC-related violations, although appropriately treated as possibly predictive of future behavior, are not as proximately relevant to the core concern of truthfulness as is the act of willful misrepresentation. Thus, with regard to this larger class of FCC-related violations we find it appropriate and sufficient to treat any violation of any provision of the Act, or of our Rules or

policies, as possibly predictive of future conduct and, thus, as possibly raising concerns over the licensee's future truthfulness and reliability, without further differentiation.[76]

b. Misrepresentation or Lack of Candor to the Commission & Abuse of Process

i. Issues Raised

58. In the NOI, the Commission observed that "our scheme of regulation rests upon the assumption that applicants will supply [the Commission] with accurate information." We remarked that "[d]ishonest practices threaten the integrity of the licensing process," and requested comment on whether misrepresentation and lack of candor should continue to be viewed "as serious breaches of the trust we should place in the broadcaster."

ii. Comments on Misrepresentation

59. A variety of responses to this inquiry were received. While commenters generally agree that these matters should continue to be considered, a number of commenting parties argue that misrepresentations which are not significant should not lead to denial of license. BML expresses surprise that the Commission even questioned whether it should continue to consider misrepresentation or lack of candor as breaches of trust.

iii. Conclusions Regarding Misrepresenation

60. As we have stated, the trait of "truthfulness" is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.[77] While the Commission has considered mitigating factors, if any, in drawing conclusions regarding the treatment of misrepre-

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[76] Although we intend to treat any violation of FCC statutory or regulatory requirements as raising character concerns, not all violations are equally predictive. As discussed more fully *infra*, the nature of the violation, the circumstances surrounding it, and other pertinent considerations may attenuate or amplify its relevance to considerations of future reliability and truthfulness.

[77] "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *FCC v. WOKO, supra* note 10, at 227. *See, also, Leflore Broadcasting Company, Inc. v. FCC, supra* note 38, at 461–462.

sentation in a case,[78] the choice of remedies and sanctions is an area in which we have broad discretion.[79]

61. We believe it necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the commission's processes cannot be maintained without honest dealing with the Commision by licensees. Given the broad discretion in this area allowed us by the case law, we are understanding of broadcaster desires that "immaterial" misrepresentation not lead to disqualification. While we do not believe it appropriate to renounce the authority we possess in this area, Commission policy will ordinarily be to consider all the facts of a case in making decisions as to the disposition of matters involving misrepresentation or lack of candor.[80]

iv. Conclusions Regarding Abuse of Process

62. As we suggested in the NOI, at 847, n. 35, such misconduct as the filing of strike applications and harrassment of opposing parties, which threatens the integrity of the Commission's licensing processes, will also continue to be considered as bearing on character. Willful or repeated violation of the Commission's *ex parte* rules also falls within this "abuse of process" area.

c. Deceptive or Fraudulent Programming

i. Issues

63. Another topic specifically addressed in the NOI is the Commission's concern that "broadcasters do not abuse the licensing privilege conferred on them through deceptive or fraudulent programming." Deceptive or fraudulent programming, the Commission commented, goes to the essence of the trust placed in a broadcaster to provide quality service oriented to the needs of its community. Thus, we tentatively concluded that "such unethical broadcasting conduct as fraudulent contests, deceptive adver-

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[78] *See*, for example, *Janus Broadcasting Company*, 78 FCC 2d 788, 791-793 (1980).

[79] Further, in cases of misrepresentation we are not required to consider the station's past program performance. *Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580, 583-584 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 905 (1971), *See, also, Independent Broadcasting Co. v. FCC*, 193 F.2d 900, 903 (D.C. Cir. 1951), *cert. denied*, 344 U.S. 837 (1952).

[80] *See supra*, text at para. 35, as to the treatment to be given misrepresentation or lack of candor before another unit of government. *See infra*, paras. 115-118, regarding our action as to BC Docket No. 78-108.

tising, news staging and news distortion" should continue to be treated as "adverse reflections on an applicant's qualifications to serve the public interest." However, we questioned whether all such misconduct should be given equal weight in evaluation of a renewal applicant's qualifications, and asked whether matters involving such misconduct as deceptive advertising should be referred to other agencies rather than scrutinized in Commission proceedings.

ii. Comments

64. Comment specifically directed to the deceptive and fraudulent programming area was somewhat limited. CBS believes that it might be appropriate for the Commission to consider a broadcaster's knowing presentation of deceptive advertising or other deceptive programming as a renewal matter, but stresses that the broadcaster "should not be expected to function as a mini-FTC." NBC comments that a broadcaster's alleged involvement "in a persistent pattern of widespread and willfully deceptive programming could well have a direct impact on its service to the public," and thus could be relevant in the renewal context if it was undertaken "with the knowledge and approval of management" and no remedial steps were taken to avoid recurrence. BML takes the position, however, that merely by asking the questions cited in paragraph 30 above, the Commission can "invite licensees to adopt a marginal standard of conduct" rather than a standard commensurate with licensees' status as "fiduciaries for the public." BML states that the Commission's question regarding the possibility of weighing different misconduct differently "leads to a Talmudic dissection of whether one kind of fraud is better than another."

iii. Conclusions Regarding Deceptive or Fraudulent Programming

65. Having again considered our earlier, tentative conclusions in this area, the Commission remains convinced that the manner in which we currently treat such broadcaster misconduct as fraudulent contests[81], news staging and news distortion[82] should not be modified at this time. Because we have retained these

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[81] *See, for example, Janus Broadcasting Company, supra* note 78. *See, also,* Section 73.1216 of the Commission's Rules.

[82] *See, for example, American Broadcasting Companies, Inc.*, 52 RR 2d 1378 (1982); *Walton Broadcasting, Inc.*, 78 FCC 2d 857 (1980). *See, also, Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981).

specific policies, engaging in such behavior will be considered as FCC related misconduct. We believe it necessary to continue to weigh such matters as the involvement of station management in the acts in question, and attempts to prevent recurrence of improper activity and other acts taken in mitigation of such acts, on a case-by-case basis.[83] It appears necessary that the facts of each case be separately considered. While this weighing process will include consideration of the significance of the particular act in question, we do not, upon reflection, believe it possible or appropriate to establish a detailed schedule of weights or differential treatment to be accorded particular types of improper conduct.

66. As to deceptive advertising, we concur in CBS' view that there must be a knowing presentation of such material by the broadcaster in order for the action to be considered a licensing qualifications matter. Thus, there must in some fashion be active participation of the broadcaster in perpetrating the deception upon the audience, either by its actual involvement in the knowing creation of a deliberately fraudulent ad or by awareness of Federal Trade commission ("FTC") or other final governmental action involving the advertisement in question. Complaints which require determinations as to whether certain advertising actually is fraudulent will, as has been our practice, ordinarily be referred to the FTC in the first instance. The question of whether a licensee knowingly participated in creation of a deliberately fraudulent ad maybe similar to that of deceptive programming, and may normally be acted upon directly by the Commission. Of course the Commission retains discretion to refer such matters to the FTC as appropriate. We find this approach consistent with the Commission's recent action in *Underbrush V* where the unreasonably burdensome investigatory requirements imposed on broadcasters pursuant to former Sec. 73.4040 were eliminated.[84]

67. We note, however, that the Commission recently eliminated, in its Underbush proceedings, certain other policies which may be considered similar to deceptive or fraudulent programming. In this regard, we note that any type of programming, including those types of programs such as astrology programs, foreign language broadcasts, etc., could be presented in a manner which would run afoul of our existing prohibitions against news distortion or fraudulent programming. To the extent such programming is used in a manner inconsistent with those policies

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[83] For further discussion of these issues, *see infra* paras. 78 and 102-106.

[84] *See Underbrush V*, *supra* note 56.

regarding news distortion, news staging or fraudulent advertising, we could consider such activity as FCC misconduct. Alternatively, if such activity were not used in a manner inconsistent with these stated policies, but resulted in an adjudicated violation of the type previously discussed under non-FCC misconduct, then the behavior could be considered relevant to an applicant's character.

C. Misconduct by Corporate Applicants

1. Questions Regarding Corporate Applicant Misconduct

68. A major area of concern in the NOI was misconduct by corporate applicants. In its fourth question, the NOI asked:

> "(d) How should the Commission treat misconduct by a corporate applicant?"

The Commission observed in the NOI that we had historically held "corporate licensees responsible for the behavior of those individuals who operate them."[85] We noted, however, that unlike a sole proprietorship or partnership, in which the owners are often involved in the daily operation of the station, corporate shareholders frequently place their trust in officers and directors to actively manage their broadcast investments. Further, the individuals who are officers, directors and shareholders may all change, yet the corporate entity will continue. We stated that this flux made it difficult to ascribe a "character" to a corporation. However, we noted that Commission policy nonetheless holds that we might "find that a corporate applicant lacks character and deny its application, when the individuals incorporate management technically responsible for any misconduct have long since departed."

69. The Commission stated that as existing policy might "punish" innocent shareholders, we were soliciting comment as to whether corporate misconduct might be "neutralized" if those managers responsible for corporate misconduct are removed. The Commission also asked for comment on how, if we adopted such a policy, we might act to prevent corporate owners from delegating all responsibility for station operation to employees, thus avoiding knowledge of or responsibility for what occurred. We further questioned what action should be taken in instances in which "the corporate managers who are responsible for wrongdoing are also

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[85] Citing *Independent Broadcasting Co.*, 43 F.C.C. 492, 494 (1950).

the controlling stockholders of the corporate licensee."

70. Finally, the Commission requested comment on "whether corporate licensees should be made to answer for the bad acts of controlling corporate entities, their management and their principals when that misconduct is relevant to the licensee's broadcast operations." In this regard, we tentatively concluded that the crucial factors were whether the controlling company exerted or might exert significant influence over the broadcast operations in question, and whether "the controlling company previously has involved the broadcast subsidiary in improprieties."

2. *Comments on Corporate Misconduct*

71. In the comments received in response to these questions, the threshold issue raised is the type of corporate conduct to be considered relevant to Commission character qualifications. A related point is the level of corporate operations at which the misconduct occurs. Thus, such parties as CBS, NBC, ABC, Tribune, American Legal Foundation ("ALF"), "Station Licensees"[86] and Blair/Post-Newsweek generally believe the Commission should not consider nonbroadcast corporate misconduct as bearing on qualifications. With regard to the parent/subsidiary relationship, AFC comments that misconduct by any of its 450 employees engaged in the insurance business in Japan could not possibly affect the operation of its broadcast stations.

72. "Station Licensees" expand upon this point by noting that the Commission has held "that it will not deem nonbroadcast misconduct by a licensee to be material if it occurred in corporate activity unrelated to the corporation's broadcast facilities." "Station Licensees" ask that we affirm the policy applied in 1980 in *Westinghouse II, supra*, in which a parent corporation was involved in "criminal representations to agencies of the federal government" other than the Commission. In that case, the Commission held that the parent corporation's misconduct was not material to an assessment of the broadcast subsidiary's qualifications to be a licensee, given the lack of criminal involvement of parent corporation personnel in a position to influence the broadcast subsidiary, and lack of the parent's involvement in the broadcast subsidiary's daily operations.[87]

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[86] "Station Licensees" are a group of licensees represented by the law firm of McKenna, Wilkinson & Kittner. The composition of the group is fully set forth in Appendix "A".

[87] "Station Licensees" find this decision consistent with such earlier cases as *General Electric Co., supra* note 34 and *Westinghouse I, supra* note 23.

73. NCCB concurs in the view that where wrongdoing occurs in a separate subsidiary and does not involve the parent corporation's top management, it should not affect the broadcast subsidiary. A similar stance is taken by UCC. However, NCCB urges that wrongful activity by a parent corporation itself be considered "as predictive of misconduct involving the broadcast subsidiary." Both NCCB and Citizens state that such matters as the existence of interlocking officers or directors and the degree of integration of subsidiary/parent operations are factors to be considered in determining whether the parent's behavior will have a negative impact on the subsidiary's broadcast operations.[88]

74. As to the manner in which conduct of individuals associated with the licensee is to be treated, several commenters state that there are a number of factors involved which must be considered on a case-by-case basis. For example, AFC suggests that if a station manager is involved, such factors as the care used in his or her selection, "the extent and sufficiency of safeguards used in supervising station operation and preventing wrongdoing," possible prior knowledge or subsequent ratification of misconduct by corporate officers, and those steps, including removal of the wrongdoer, taken to remedy the misconduct or prevent recurrence are all factors to be considered. Similarly, "Station Licensees" state that whether the employee misconduct was contrary to management instructions is a relevant consideration.[89] However, CBS argues that licensees should not be expected to routinely remove personnel, absent some judgments, at least within the corporation, as to their responsibility for the improprieties. CBS states that "[i]f a contrary approach is followed, licensees may feel pressured to remove executives not because of their own evaluation that they have been guilty of wrongdoing, but out of fear that the Commission may take a different view and draw negative inferences from the licensee's failure to take 'prompt' action to dismiss those employees." A number of parties argue that any misconduct being considered should, as is currently the case, be balanced against the broadcast record of an existing licensee as the Commission makes its decision.

75. Citizen's contends that removal of the management responsible for the misconduct in question is an inadequate deterrent to future misconduct and an inadequate punishment for present

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[88] Both Citizens and NCCB cite the Commission's approach in *RKO General, Inc., supra* note 34, as an example of the manner in which such situations should be addressed.

[89] Other parties with similar views include NBC and NRBA.

misdeeds, although it finds that on rare occasion removal of the offending employees may be enough to protect the public interest. UCC observes that the principals of a station are responsible and should not be able to shift that responsibility by pointing a finger at an aberrant employee. NCCB argues that the Commission should not allow "neutralizing" of misconduct if the individual in question is a majority stockholder, stockholder and director, or otherwise in *de facto* control of the corporation, while NBMC states that qualifications of individual stockholders, officers and directors cannot be separated from those of the corporation, as they are deemed the alter ego of the corporation. NBMC contends that the mere fact that management has changed or seemingly innocent individuals will be affected should not immunize the corporation from the consequences of misconduct.

3. Conclusions on Corporate Applicant Misconduct

a. Types of Misconduct To Be Considered

76. It is the Commission's intention that applicants be treated as consistently as is possible with respect to character qualifications, with the minimum necessary regard given to the legal form in which they do business. Thus, we find as an initial matter that the same types of misconduct should be considered when corporate applicants are involved as when the applicant is a sole proprietorship or partnership.[90] The same violations of the Communications Act, Commission rules or Commission policies and adjudicated cases of relevant non-FCC misconduct have a bearing on the qualifications of an applicant entity regardless of the form in which it does business.[91]

77. It is clear that an adjudicated finding against the applicant itself would meet this test. However, a more difficult question concerns the relationships between individual and corporate misconduct. As we indicated in the NOI, and as the comments make clear, the determination of how to treat misconduct, both FCC-related and non-FCC related, when the actual wrongdoer is, variously, an applicant's employee, officer, director or shareholder, the parent corporation of the applicant (or any of the parent's personnel), or another subsidiary of a common parent (or the

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[90] *See* paras. 1–67.

[91] It is, however, the case that "corporate misconduct often can be cured by replacing management and directors, whereas individual malfeasants may not so easily change their spots." *RKO General Inc. v. FCC, supra* note 34 at 227, n. 33.

subsidiary's personnel) is a more complex task.

b. Employee Misconduct

78. A corporation must be responsible for the FCC-related misconduct occasioned by the actions of its employees in the course of their broadcast employment.[92] To hold otherwise would, *inter alia*, encourage corporate owners to improperly delegate authority over station operations in order to "neutralize" any future misconduct. Our review of the record leads us to conclude that (as to both FCC and non-FCC misconduct) mitigating factors must be considered on a case-by-case basis. Thus, whether the effect of misconduct can be tempered by removal of the managers responsible for the wrongdoing in question involves numerous considerations, including the care taken by the applicant prior to occurrence of the misconduct in question, including any special training given.[93] Merely standing back and waiting for disaster to strike or for the Commission to become aware of it will not insulate corporate owners from the consequences of misconduct. While we agree with CBS that licensees should not be expected to remove personnel without some internal judgments regarding responsibility for improprieties, we note that any internal investigations must be conducted with dispatch. As we indicated in paragraph 75, it is our intention to treat licensees consistently with respect to character qualifications. Thus, wrongdoing by corporate managers who are also controlling stockholders will be treated as though the individuals involved were sole proprietors or partners.

C. Parent-Subsidiary Relationships

79. As to the parent/broadcast subsidiary relationship, we agree with "Station Licensees" that such situations as that found in *Westinghouse II, supra*,[94] should not be deemed relevant to the broadcast subsidiary's qualifications to be a licensee. As a general

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[92] Non-FCC misconduct will be considered in those circumstances discussed previously.

[93] Clearly, innocent shareholders will not in all cases have their investments protected under this scheme. Such shareholder exposure to risk appears unavoidable. See, in this regard, *Independent Broadcasting Co. v. FCC, supra* note 85. However, responsible shareholder efforts will be recognized. *See WIGO, Inc.*, 85 F.C.C. 2d 196, 207-213 (1981).

[94] *See* para. 69, *supra. See, also, Cowles Broadcasting,Inc.*, 86 F.C.C.2d 993, 997-1002 (1981), *aff'd sub nom., Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 508, n. 29 (D.C. Cir. 1982), *cert. denied*, 203 S. Ct. 1774, 76 L.Ed. 2d 346 (1983) ("*Central Florida II*").

matter, however, if a close ongoing relationship between the parent and the subsidiary can be found, if the two have common principals, and if the common principals are actively involved in the day-to-day operations of the broadcast subsidiary, we will then consider the significance of the relationship of the non-FCC misconduct to the operation of the broadcast subsidiary. In this regard, we will focus on the actual involvement of the common principals in both the misconduct and in the day to day activities of the broadcast subsidiary. This standard will also be employed where the non-FCC misconduct of a non-broadcast subsidiary is being imputed to the parent corporation. In this context, however, we will consider mitigating factors similar to those described in paragraph 78 above. In addition, if the corporate parent is in any way involved in FCC-related misconduct, whether or not such misconduct involves the broadcast subsidiary, the bearing of that misconduct on the subsidiary's qualifications would be considered.[95]

80. Question remains as to the treatment of wrongdoing by an employee, officer, director or shareholder of the parent corporation. With regard to non-FCC misconduct, we find it appropriate to follow the procedure determined to be proper for other broadcast applicants. Further, the individual involved in such acts must have an interest in the parent corporation which is recognized and attributed under the multiple ownership rules.[96] If the individual's role in the parent is not such as to confer an attributable interest, the Commission finds no basis on which to consider his or her nonbroadcast actions for character purposes. Finally, the individual must actually be involved in some fashion in the day-to-day operations of the broadcast subsidiary.

81. If these conditions are met, the Commission will consider the impact, if any, of the individual's relevant adjudicated non-FCC misconduct on the qualifications of the broadcast subsidiary. We find that FCC-related misconduct of those individuals associated with the parent corporation and also involved in subsidiary operations, occurring in the course of their employment, (whether or not involving a broadcast subsidiary) raises sufficient question regarding the subsidiary's qualifications so that such matters will receive consideration. In such cases, the

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[95] As discussed, *infra* at paras. 103–107, that the misconduct has occurred is not of itself dispositive of the final action to be taken by the Commission. Various other aspects of station operations must also be considered. As to the impact of FCC-related misconduct on other FCC-regulated services, *See Cablecom-General, Inc.*, 87 F.C.C. 2d 784 (1981).

[96] *See supra*, at para. 48.

Commission finds that holding of an attributable interest by the individual is not necessary. While the impact of the individual's actions on daily broadcast operation may have been limited, the involvement of the individual in broadcast activity may raise a character question and warrants at least some exploration. Such factors as corporate efforts to remove the miscreant prior to Commission awareness of the wrong committed and to prevent recurrences will, of course, be considered in mitigation.

d. Related Subsidiary

82. Engaging in the previously described non-FCC misconduct at a related subsidiary which results in an adjudication as to the subsidiary itself will require that there be principals shared with the broadcast subsidiary in order for the matter to be further considered. Adjudications of individual acts occurring at a subsidiary will require showing of the involvement of the relevant individual in the activities of the broadcast subsidiary, and the existence of an attributable interest in the broadcast subsidiary. FCC-related misconduct will be treated in the same fashion as that involving the parent-subsidiary relationship.

D. Misconduct and Multiple Owners

1. Questions Raised

83. Related to the treatment of corporate misconduct is the manner in which misconduct at one station owned by a multiple licensee is viewed as influencing the Commission's disposition of transactions involving other stations owned by that licensee. The NOI set forth two questions on this matter:

> "(e)" What impact should a finding of misconduct at one station have on the Commission's treatment of other commonly controlled stations?"
>
> "(f)" What effect should misconduct at one station have upon a multiple-owner licensee's ability to acquire or assign other licenses?"

84. The Commission observed in the NOI that it had historically "tried to determine whether, as a result of misconduct at the licensee's first station, the Commission had any reason to believe that there was a likelihood of the same or similar misconduct occurring in the future at the licensee's other stations."[97] We

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[97] We stated that in instances in which the conduct in question is being investigated in a hearing and the renewals of the owner's other licenses are pending, we might be unable to determine the relevance of the conduct to the

tentatively concluded that the determination in question depended on "the seriousness of the conduct at the first station as well as the licensee's past performance at each of its other stations." We requested comment on the view that an adverse finding regarding one station should not be automatically extended to others, suggesting that the misconduct at the first station might "be considered as evidence rather than a determinative finding" that such wrongdoing could be expected to recur at other commonly-owned facilities.

85. The Commission noted that the then-existing policy regarding sale of other commonly-owned facilities was to determine at the time of designation whether there was a substantial likelihood that the allegations being considered bore upon the prospective operation of the other stations.[98] If the finding was in the affirmative, the Commission advised the broadcaster that transfer or assignment applications for the other stations would not be entertained. This action could be taken by conditioning the renewal of the other stations. If no such limitation was expressed by the Commission, the licensee was free to assign or transfer in accordance with normal procedures. However, the Commission retained the right to impose limitations or take appropriate action against the other stations at a later time if circumstances warrant. Conversely, limitations imposed might later be removed if found appropriate.

86. While the Commission found those procedures to be an improvement over the former policy of deferring action on the assignment or transfer applications related to uninvolved station[99], we solicited comment on further changes. One such proposal on which comment was requested was that when it appears an allegation warranting designation of one station bears upon the operation of others, those other stations be designated for hearing in order to provide the licensee the opportunity to demonstrate that the alleged misconduct involving the first station is not relevant to the others. We further requested comment as to whether, in order to remove an undesirable licensee from the airwaves, it might be proper to allow the

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operation of other stations. We requested comment as to whether, in such cases, we should "designate the renewal applications of these other stations for hearing, defer action on their renewals or grant those renewals (assuming they are grantable in all other respects) without prejudice to the taking of further action based on the finding deduced in the ongoing investigation or Commission hearing."

[98] *See Grayson Enterprises, Inc.,* 79 FCC 2d 936, 940 (1980).

[99] *Policy Statement on Qualifications of Broadcast Licensees,* 28 RR2d 705 (1973).

licensee to sell the station "with some kind of bar to future ownership or management of broadcast facilities," even if a profit is derived. We asked for comment as to whether, (consistent with our proposal on sales), the transfer or assignment application for an acquisition should be designated for hearing so the licensee would have the opportunity to show that the conduct in the first hearing was not relevant, or, alternatively, whether we should approve the assignment conditioned on the findings in the hearing on the first station.

2. Comments

87. Commenters such as NBC, Tribune, AFC and NRBA concur in our tentative view that misconduct at one station should not be presumed to be relevant to others. NBC remarks that the fact that misconduct has not occurred at the other stations is evidence that the licensee can operate them in the public interest, and states that the renewals of such stations' licenses should be granted rather than deferred. NRBA and Citizens comment, however, that if the licensee has engaged in fundamental misbehavior, such as clear misrepresentation to the Commission, that misconduct should be considered to apply to all of the licensee's stations. Similarly, UCC contends that if the misconduct reflects the licensee's attitude toward regulation, said misconduct might have an impact on all of its licenses.

88. NCCB, NBMC and CCA take a more restrictive view, arguing that generally all commonly controlled stations should be treated consistently, misconduct at one station consituting a strong presumption that the licensee is not qualified to operate the others. NBMC states in this regard that the greater the revenue expectation, the greater is the responsibility. However, CBS contends that even in a situation in which denial of renewal might be proper for deterrence, multiple denials would go beyond anything necessary to achieve the Commission's legitimate goals.

89. As to transfers and assignments, such parties as ABC, "Station Licensees" and NCCB recommend that we retain the *Grayson* policy, while CBS supports the proposal that in cases in which the Commission determines assignments will not be allowed, the party involved have the right to ask for an immediate hearing so as to show its other stations are not involved. Both CBS and NBC also encourage the use of unrestricted post-designation non-distress sales in order to increase the licensee's incentive to forego a hearing, rid the community of a possibly

"unfit" licensee, avoid imposition of an unduly harsh financial penalty—the loss of the investment involved—increase investor certainty and encourage capital investment in broadcasting. However, NCCB believes that allowing such transactions would encourage misconduct, "since licensees would be confident that if their misconduct is discovered, they could always sell their remaining licenses," a view in which Citizens joins.

90. BML suggests that the *Grayson* policy be reversed and distress sales of uninvolved stations allowed even pre-designation. A distress sale is sanction enough, BML contends, and will eliminate the need for a lengthly hearing, remove a poorly performing licensee, and advance minority ownership. BML also advocates that in appropriate circumstances our policy barring distress sales after Initial Decisions have been rendered might be waived. In a contrary vein, Citizens proposes a return to the 1973 policy, with increased expedition in the Commission's handling of the applications in question.

91. As to the policy of prohibiting acquisitions by licensees in hearing on basic character issues, CBS supports our alternative proposal of designating the matter for hearing, or conditionally approving the acquisition, while NBC believes a licensee whose misconduct has been found directly bearing on operations in only one community "should not be precluded from acquiring additional licenses if the standards for such acquisitions otherwise are met." However, NCCB opposes conditional acquisitions and argues that allowing a hearing to establish that there has been no misconduct which would apply to the new station would be "a total waste of Commission resources." There would be a strong possibility, NCCB states, that the licensee would be forced to cease operations within a short period of time, and "if the misconduct later results in an adverse finding, the Commission has placed itself in a quandary concerning the new license grant to an untrustworthy licensee."

3. Conclusions on Multiple Owner Misconduct

92. After considering the record developed herein, the Commission reaffirms its tentative view that there should be no presumption that misconduct at one station is necessarily predictive of the operation of the licensee's other stations. We do, however, agree with NRBA and Citizens that some behavior may be so fundamental to a licensee's operation that it is relevant to its qualifications to hold any station license. This is, however, a

question of fact which must be resolved by the Commission on a case-by-case basis.[100] We do not believe that NCCB, NBMC and CCA have made a persuasive showing that there is a basis for automatically presuming that misconduct at one station means the licensee is unqualified to operate others. In this regard, there is merit to NBC's view that the apparently proper operation of the other stations is itself evidence of the licensee's capacity to operate broadcast stations in the public interest.[101]

93. In early 1983, the Commission overruled that element of the *Grayson* policy which involved limiting station transferability by conditioning the license renewals of those of the multiple owner's stations not being designated for hearing. Under the new policy, the transferability of commonly-held stations is settled at the time of designation of the station whose qualifications are primarily at issue. The Commission found that "[i]f the charges are serious enough to possibly affect the transferability of the multiple owner's other stations, then by designating all the stations, we afford licensees faced with qualifications questions a better opportunity to defend themselves at the earliest practicable date." Unless the licenses are designated, they are freely transferable without condition.[102] The action taken is consistent with one of our NOI alternative proposals, and we believe the new policy, which was adopted after substantial experience with the procedures set forth in *Grayson*, should remain in effect. Thus, no restrictions will be placed on the renewals of any stations not designated. We do not find that reapplication of the restrictions of the 1973 policy, as advocated by Citizens, would be a proper method by which to advance our regulatory goals.[103]

94. As with renewals, we find that restrictions on new acquisitions should be consistent with the action taken regarding assignments and transfers. Thus, absent Commission action to

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[100] *RKO General, Inc. v. FCC, supra* note 8 at 237.

[101] There is a rebuttable presumption of service in the public interest. *BCFM, supra* note 17 at 416.

[102] *James S. Rivers*, 48 Fed. Reg. 8585, published March 1, 1983; *Transferability of Broadcast Licenses*, 53 R.R. 2d 126 (1983).

[103] We also note that there is a pending proceeding concerning changes to our distress sale policies. *See Notice of Proposed Rule Making* in MM Docket No. 85-299, FCC 85-543 (released October 8, 1985). Accordingly, we shall reserve judgment regarding post-designation distress sales. We would observe, however, that concerns regarding an applicant's character are generally more relevant where an applicant is acquiring, as opposed to transferring, a broadcast license. Moreover, the policy of deterrence, which is primarily aimed at ensuring compliance with our rules and policies, is not necessarily implicated by permitting transfers when the alleged misconduct involves non-FCC related activity.

restrict transfers or assignments of the licensee's other stations, we will in the future ordinarily allow such acquisitions to take place without conditions being imposed.[104] If the Commission has not as an initial matter found that the allegations under consideration involve conduct likely to impact the future operations of other stations, there generally appears to be no reason to condition or defer such transactions. We note, however, that allowing the initial acquisition does not affect the Commission's discretion to take action against the newly acquired stations, should the Commission's inquiry ultimately reveal that the application does not possess the requisite basic qualifications to remain a licensee.

95. Under present procedure, however, no decision is made regarding the seriousness with which the Commission views misconduct at a singly-owned station designated for hearing. Given our new procedures regarding acquisitions, we will in the future indicate in the designation orders of such stations if restrictions on acquisitions are to be imposed. In the absence of any action, no restrictions are to be presumed. As to the new applicant with no stations and its first application in hearing on character issues, additional acquisitions will be defferred or made subject to the outcome of the pending proceedings. We believe this procedure is appropriate because, unlike multiple owners with existing licenses, new applicants have no demonstrable evidence of their ability to perform consistent with the Commission's rules and policies.

E. Factors for Analysis

1. Questions

96. The last question formally raised in the NOI was:

> (g) What factors are appropriate for analysis when examining an applicant's past misbehavior?

97. In this regard, the Commission noted that we had traditionally "analyzed the substance of the improper activities to determine their relevance and weight with respect to the ability of the applicant to operate its requested facility in the public interest." We observed that while we had, in the *Uniform Policy*, recognized that there is "no simple formula for predicting future conduct in every case," we had also in that document set forth several factors to be considered when determining the weight to

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[104] *See Metroplex Communications of Florida Inc.*, FCC 84-244 (June 1, 1984).

be given acts of misconduct. These factors include "whether the misconduct was isolated or recurring, inadvertent or deliberate, and recent or remote." We asked for comment as to whether these and/or other factors were proper to apply in our efforts to predict future broadcast behavior. Additional factors which we proposed might be appropriate are the degree of harm inflicted on the public, the nature of the knowledge and involvement of management officials and significant stockholders, and "whether prompt corrective action has been taken." Further, we asked whether there was some point (perhaps ten years preceding the filing of an application) "beyond which misconduct should not be considered because of its age."

98. We emphasized that whatever factors were found relevant to our evaluation, "the Commission's constant goal should be to ensure licensee reliability." Thus, we asked for comment as to whether we should grant an application, regardless of serious misconduct, if the applicant can demonstrate "that it is capable of being trusted to operate its station in the public interest and that the likelihood of future misconduct is non-existent."

2. *Comments*

99. In response to our inquiry, a number of commenters, including Tribune, CBS, NCCB, and Citizens, suggest retention of the three factors of the *Uniform Policy*. Citizens states that a presumptive ten year statute of limitations might be an appropriate limitation on consideration of past misconduct, while CBS argues that "[w]ith the possible exception of conduct which may be said to reflect a pattern of flagrant disregard of the Commission's regulations and policies," there is no reason that activity occurring prior to the current license term should be considered.

100. Both Tribune and CBS state that any misconduct being considered must be weighed against the licensee's broadcast record. Tribune suggests that relevant factors in addition to those in the *Uniform Policy* include whether management was involved and whether corrective steps were taken. CBS comments that the degree of harm to the public is a factor which might be taken into account. NCCB agrees that the seriousness of the infraction is important, but would also consider whether the wrongdoer is contrite or unrepentant. Similarly, Citizens suggest that rehabilitation is relevant. Citizens also urges that the Commission take care "not to limit its ability to conduct as full of an inquiry as the specific facts demand." However, NAB argues that under the

Uniform Policy, the Commission has "sought to draw ultimate inferences concerning an applicant's future good faith and probity from a variety of findings concerning the *mens rea* underlying particular aspects of the applicant's past conduct." NAB contends that "even if predictions of future trustworthiness could be quantified in some fashion, the Commission has never sought to define the degree of risk to the public that it will find acceptable." Thus, NAB concludes, "[i]t is apparent in retrospect that this approach to character leaves the widest room for the kind of subjective, inconsistent decision-making that the Notice candidly describes." The danger, NAB states, is that "a facade of objectivity will be constructed around an assessment that is ultimately intuitive."

101. In response to the Commission's question as to whether an applicant who had engaged in serious misconduct might nonetheless have its application granted if it could demonstrate the ability to operate in the public interest with no likelihood of future misconduct, Citizens states that the question "presents something of a contradiction in terms," observing that no examples were given. Citizens argues that "serious wrongdoing by definition disqualifies an applicant from becoming or remaining a public trustee," and states that "mere promises of exemplary future behavior cannot form the basis for grant of a license."[105] Thus, Citizens finds that while it might be "arguably conceivable in the abstract to, for example, grant renewal in spite of serious misconduct, it is impossible to here fashion a benchmark for resolving such a case." Citizens contends that this would have to be done, "if at all," case-by-case.

3. *Conclusions Regarding Analysis*

102. Upon consideration of the record developed, and in view of our experience in this area, the Commission finds that the three factors of the *Uniform Policy* should continue to be utilized in determining the weight to be accorded acts of misconduct. We continue to believe that the willfulness of the misconduct, the frequency of such behavior, and its currency are relevant to the process of making predictive judgments about future broadcast performance. We further find that the factors set forth in the NOI, which have in fact been used at various times in our past analyses, are also useful to this process. The seriousness of the

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[105] Citing *United Church of Christ v. FCC*, 359 F.2d 994, 1008 (D.C. Cir. 1966) ("*United Church I*").

misconduct, the nature of the participation, if any, of managers and owners, and the efforts made to remedy the wrong all appear to benefit the analytic process. Additionally, the applicant's record of compliance with our rules and policies, if any, should ordinarily be taken into account.[106]

103. As we have earlier observed,[107] deterrence is an important element of the character qualifications process, as it helps to ensure future reliability and truthfulness. The role of deterrence in the licensing process has long been recognized.[108] The purpose of the character qualifications aspect of the Commission's licensing process is not, of course, to eliminate licensees from further activity in broadcasting, but, as we have stated, to assure that those granted a license will be truthful in their dealings with the Commission and reliable operators of their stations. Sanctions imposed may deter future misconduct of the applicant in question and of others observing our actions. As many commenters note, a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission. Suffering the loss of one station, with the costs thereby imposed, will likely serve to deter all but the most unrepentant from serious future misconduct. Only in the most egregious case need termination of all rights be considered.

104. While we understand NAB's concerns regarding the pitfalls of this process, we believe that insofar as we have determined that character qualifications findings are to continue as part of broadcast licensing such analyses are necessary, notwithstanding that they are sometimes imprecise. The Commission is, however, of the view that in redefining the type of conduct we consider relevant to making character findings, and in refining the manner in which allegations of misconduct will impact upon the licensing process, we have taken significant steps to make our efforts in this area more equitable and efficient.

105. The Commission finds that NAB's concerns regarding subjectivity are relevant to NCCB's request that we consider whether the wrongdoer is "contrite or unrepentant," and will not add to our list of factors regularly to be applied. However, we concur with Citizens that rehabilitation is significant. We find that factors which we have already determined to consider,

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[106] We stress that this analysis only comes into play after the Commission has found the conduct in question involves character issues.

[107] *See supra* note 26.

[108] *FCC v. WOKO, supra* note 10 at 228. *See also Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026 (D.C. Cir. 1981).

including the passage of time since the misconduct, the frequency of misconduct, the involvement of management and the efforts to remedy the situation, are good evidence as to whether rehabilitation has occurred. No separate "rehabilitation" inquiry appears necessary, although findings regarding rehabilitation would not be inappropriate. As to the time period relevant to character inquiries, we find that, as a general matter conduct which has occurred and was or should have been discovered by the Commission, due to information within its control, prior to the current license term[109] should not be considered, and that, even as to consideration of past conduct indicating "a flagrant disregard of the Commission's regulations and policies," a ten year limitation should apply. The "inherent inequity and practical difficulty"[110] involved in requiring applicants to respond to allegations of greater age suggests that such limit be imposed.

106. As a last consideration in this area, the Commission notes that having again reviewed the matter, we find merit to Citizens' analysis regarding whether the applicant involved in serious misconduct might have its application granted if it could show the ability to operate in the public interest with no likelihood of future misconduct. The granting of such application is, as Citizens states, "arguably conceivable in the abstract," but the matter must be confronted on the facts of a particular case.

IV. Comparative Proceedings

1. Questions Presented

107. A significant matter which remains to be determined is the manner in which character issues should be treated in comparative proceedings. The present treatment of comparative hearings involving new applicants is governed by the *1965 Policy Statement on Comparative Broadcast Hearings*[111], which also controls the introduction of evidence, but not the weight given the various criteria, in comparative proceedings involving renewal applicants.[112]

108. In the *1965 Policy Statement*, the Commission said as to the treatment of character:

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[109] This time limit is consistent with our recent handling of such matters. *See Central Texas Broadcasting Company, Ltd.*, 90 F.C.C.2d 583, 593 (Rev. Bd. 1982), *aff'd _____ FCC 2d _____ (1983).*

[110] *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1406-1407 (1979), *recon. denied*, 46 R.R.2d 1583 (1980).

[111] 1 FCC 2d 393 (1965) (hereinafter "*1965 Policy Statement*").

[112] *Seven (7) League Productions, Inc. (WIII)*, 1 FCC 2d 1957, 1958 (1965).

> Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not be entertained.[113]

2. Comments

109. Limited comment was received on the treatment of character in the comparative process in response to the NOI. For example, ABC and NRBA suggest that consideration of nonbroadcast misconduct might be appropriate as a comparative factor. ABC states that this might be useful to distinguish which of the applicants can best be relied upon to be honest and to comply with the Communications Act, Commission rules and policies. However, NRBA would not consider such misconduct relevant to a renewal applicant.[114]

3. Conclusions

110. After reviewing the record in this proceeding and in light of our own experiences adjudicating character issues in the comparative context, we are of the view that character considerations should be excluded from comparative analysis. We believe that such an approach is consistent with the policies articulated in the *1965 Policy Statement* as well as the new guidelines established herein. It is significant that one of the primary purposes of the *1965 Policy Statement* was to eliminate from the hearing process time consuming elements not substantially related to the public interest.[115] As applied to character, the Commission recognized that while character considerations "may be appropriate" as a comparative factor, there was a need to avoid unduly prolonging the hearing process.[116] Balancing these competing considerations, the Commission concluded that in the absence of a designated issue, character evidence would not be taken.[117]

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[113] *1965 Policy Statement*, *supra* note 111 at 399.

[114] NAB suggests that we consider the issue in a subsequent inquiry. However, Blair/Post-Newsweek oppose this view, stating that there is no particular reason to deal with character differently in a comparative context than in any other applications situation.

[115] *See 1965 Policy Statement*, *supra* note 111 at 394.

[116] The Commission noted, "[o]ur intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant converts the hearing into a search for his opponents minor blemishes, no matter how remote in the past or how insignificant." *Id.* at 399.

[117] *Id.*

Moreover, the Commission noted that it did not intend to stultify the continuing process of reviewing its judgment as to the scope of its character inquiry in the comparative context.[118]

111. Our experience with the standards established by the *1965 Policy Statement* reveals that we have been unsuccessful in screening out those comparative character issues which have little relevance to our regulatory concerns. Narrowing the range of relevant behavior will not by itself, screen out all issues lacking in probative value. Even where the type of misconduct is basically probative we find ourselves in the position of adjudicating an applicant's minor transgressions which have very little bearing on its ability to act as a responsible broadcaster.[119] Moreover, in comparative proceedings the character issues specified seldom prove to have decisional significance.[120]

112. Elimination of character as a comparative issue is also consistent with the policy objectives underlying in the instant proceeding. As observed previously, the scope of the Commission's character inquiry will now focus on those aspects of an applicant's character that relate to its proclivity for truthfulness in dealing with the Commission and its propensity for complying with our rules and policies.[121] Unlike our prior approach — which often attempted to determine which applicant possessed superior moral fiber — the policies underlying our new character inquiry do not readily lend themselves to a comparative analysis. In this regard, the propensity for an applicant to be truthful and reliable related to its basic qualifications to be a licensee. Once this fact has been established, further comparative inquiry is of marginal benefit.[122] Because our previous policies attempted to determine which applicant was morally superior, there was an incentive to

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[118] *Id.*

[119] As the Review Board has observed, "[i]t is recognized that in comparative licensing proceedings where the applicants qualifications are freqently fairly close, it is all but irresistible to stick the competition with a misrepresentation or lack of candor finding as a surefire way to secure the license. It is not surprising, therefore, that our comparative case law is littered with allegations of prevarication to the point where an unfamiliar reader would declare that our processing files are a collective rap sheet of the nation's pathological liars." *Fox River Broadcasting Company, Inc.* 88 FCC 2d 1132, 1139 n.15 (Rev. Bd. 1982) aff'd 93 FCC 2d 127 (1983).

[120] A review of all comparative proceedings reported in *Pike and Fisher Radio Regulations 2nd Series* reveals that designated comparative character issues, as opposed to basic qualifications issues, have been dispositive in only approximately eight cases during the past twenty two years.

[121] *See infra* text as paras. 21-23.

[122] In this regard, our approach to character is similar to our consideration of citizenship and financial qualifications. *See* 47 U.S.C. § 308(b); *1965 Policy Statement, supra* note 111 at 399 n.13.

compare all aspects of an applicant's character with that of its competitor. The new focus of our character inquiry, however, has eliminated the need for such a comparative approach.

113. In light of these considerations, we can no longer justify the costs associated with comparative character evaluation. Such an evaluation increases the cost, complexity, length and subjectivity of these proceedings without a sufficient benefit. Nothing in the Communications Act requires that there be comparative character issues. Accordingly, if consideration of character does not lead to disqualification, it will no longer be a relevant criterion in comparative proceedings involving new applicants.

114. We also believe that comparative character issues should be excluded from consideration in comparative renewal proceedings. As observed previously, there appears to be no basis for treating existing licensees differently from new nonlicensee applicants.[123] Moreover, the policy considerations for eliminating comparative character issues in the new applications process are equally applicable to the comparative renewal process. In addition, we believe that the existence of a record of compliance with our rules and policies renders comparative character analysis inappropriate in the renewal context. The fundamental purpose of our character inquiry is to make predictive judgments relating to an applicant's propensity to deal honestly with the Commission and to comply with our rules and policies. In the comparative renewal context, however, a licensee's record of compliance provides direct evidence of an applicant's future behavior. In this regard, we believe that direct evidence of an applicant's behavior outweighs predictive judgments based on extrinsic evidence of an applicant's character.[124] Of course where evidence of bad character during the preceding license period is of such a nature so as to raise a qualification issue, then such evidence should be considered. Accordingly, if consideration of character does not lead to disqualification, it will no longer be a relevant criterion in comparative renewal proceedings.[125]

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[123] *See supra* at para. 49.

[124] The Commission has implicitly recognized this fact in numerous cases where an applicant's past broadcast record has outweighed a comparative character demerit. *See Westinghouse I, supra* note 22.

[125] Our action today in no way prejudges consideration of compliance with the Communications Act and/or the Commission's rules and policies as it may relate to an incumbent's past broadcast record in the context of acquiring a legitimate renewal expectancy. *See Notice of Inquiry* in Gen. Docket No. 81-742, 88 FCC 2d 120 (1981) For example, violations of the Communications or a specific commission rule or policy may militate against the finding of a meritorious record.

V. BC Docket No. 78-108

1. Questions Presented

115. The final matter to be considered in this document is the disposition of the NPRM in BC Docket No. 78-108. In the character NOI, the Commission observed that a number of remedies are available to us when misconduct does not warrant denial of the application in question. We stated that "[t]he ability to impose these lesser sanctions accords the Commission great flexibility in dealing with various infractions." In this regard, we took note of the proposed rules amendment in BC Docket No. 78-108, which would, we stated, "allow the Commission to take direct action against applicants who have engaged in immaterial misrepresentations not warranting denial of their application."

116. In the BC Docket No. 78-108 NPRM, the Commission noted that while, pursuant to the Communications Act[126] and to 18 U.S.C. § 1001, licensees and permittees have an obligation to respond to Commission correspondence in a prompt and truthful manner, the current rules regarding such obligations are primarily limited to matters related to pending applications or Official Notices of Violation. The Commission found that in some instances prompt and accurate responses to Commission correspondence and inquiries were not being received and proposed adoption of a rule in this respect which would in turn subject licensees and permittees to appropriate administrative sanctions (including possible forfeitures). The proposed rules changes would require responses "within the times specified" by the Commission, as well as prohibiting misrepresentations in all written submissions from permittees and licensees.

2. Comments

117. Comments on the proposal were received from ABC and NRBA. ABC opposes both aspects of the proposal, arguing that the changes are "unnecessary and unwarranted." ABC contends that "there is no dearth of agency requirements for prompt responses to inquiries pertinent to the exercise of the F.C.C.'s regulatory responsibilities, and there are ample means at the agency's disposal to require both timely and truthful responses." Although NRBA opposes adding the rule on timeliness of responses, it supports the proposal regarding misrepresentation.

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[126] Citing Sections 308(b) and 312.

NRBA notes that as to the regulation on misrepresentation, "[t]he proposal here in question would merely serve to include specific reference" to the obligation to respond truthfully to the Commission in the rules, the effect being "to accord the Commission additional flexibility in its treatment of untruthful responses." NRBA concludes that this change "would not create any new burdens for broadcasters," but, rather, would "benefit broadcasters by making available to the Commission a wider range of sanctions with which to penalize misrepresentations."

3. Conclusions

118. The Commission finds upon consideration of the record that the proposal of a new regulatory requirement mandating timely responses to all Commission inquiries, regardless of their nature, would impose a requirement not shown to be necessary, and extremely complex and costly in implementation. Such a rule might well require Commission mailing of all requests by certified mail, necessitating record-keeping as to which the public interest benefit has not been demonstrated. Our experience in the years which have elapsed since issuance of the NPRM does not reveal the need for this rule. As to the rule on misrepresentation, we are persuaded by the comments of NRBA, and by our reflections upon the treatment of character issues, that the adoption of a new rule Section 73.1015 consistent with our findings herein is in order. The text of the new rule will be found in Appendix "B".[127]

VI. Regulatory Flexibility Analysis

119. Our action in BC Docket No. 78-108 constitutes a final rule under section 553 and generally requires a final regulatory flexibility analysis. In the instant case, however, the *Notice of Proposed Rule Making* was issued prior to January 1, 1981. Pursuant to section 4 of the Regulatory Flexibility Act, P.L. No. 90-623, 82 Stat. 1312 (1980), the obligation to prepare a final regulatory flexibility analysis applies only to rule making proceedings in which a notice of proposed rule making was issued on or after January 1, 1981. Accordingly, a regulatory flexibility

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[127] In addition, we have made appropriate revisions to Section 73.3513. We are also amending Section 73.4280 to reflect our deletion of the *Uniform Policy* and the substitution of the policies adopted herein.

analysis is not required in this proceeding.

120. In any event, we do not believe that adoption of this *Report, Order and Policy Statement* will have an adverse impact on small businesses. In this regard, all broadcast applicants will be treated equally with respect to character qualifications and no unique burdens will be placed on small businesses. Moreover, our action in these proceedings will most likely benefit small businesses by expediting the hearing process and thereby reducing the expenditure of time and resources by applicants. Finally, our action in BC Docket No. 78-108, which establishes a new rule prohibiting misrepresentations to Commission inquiries merely codifies our longstanding policy of requiring candor in all dealings with the Commission. We do not perceive such a requirement as imposing a burden on any type of business entities.

VII. Miscellaneous

121. All designation orders adopted after the effective date of this *Report, Order and Policy Statement* should reflect the policies adopted herein. As to comparative proceedings in which the record is still open, the Administrative Law Judge should render his or her decision pursuant to the policies adopted herein. All proceedings which are currently before the Commission, its staff, or any other Commission body should, where appropriate, be resolved consistent with the policies set forth. Cases already decided by the Commission or the Review Board will not be reconsidered, but appeals of Review Board decisions will be acted upon consistent with the policies adopted herein.[128] This action comports with traditional judicial practice while respecting the need for administrative finality, and is consistent with prior Commission practice.[129]

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[128] On October 23, 1981, United Broadcasting Co., Inc. ("United") filed a motion to strike the "Joint Comments" of District Broadcasting Company, *et al.* ("District"). United contends that the "Joint Comments" are in essence arguments on the merits of certain pending comparative renewal proceedings. In its opposition to the motion to strike, submitted on November 5, 1981, District argues that the purpose of its comments was not to litigate the merits of a particular proceeding, but only to illustrate its discussion of certain matters under consideration in the instant rulemaking. United's reply to District's opposition to the motion to strike, filed on November 9, 1981, asserts that District's statement that its intention was not to litigate the issues involved in other proceedings "defies reason and common sense." The Commission has entertained District's "Joint Comments" to the degree that they properly relate to this rule making proceeding, and said "Joint Comments" are otherwise dismissed.

[129] *See Policy Statement on Comparative Broadcast Hearings*, *supra*, at 399-400.

122. Accordingly, IT IS ORDERED that, because of the applicability of this Report Order and Policy Statement to pending proceedings and in accordance with Section 553(d)(2)(3) of the Administrative Procedure Act, the policies announced herein ARE ADOPTED, and Section 73.4280 of the Commission's Rules IS AMENDED as set forth in Appendix "B", effective upon publication in the Federal Register.

123. IT IS FURTHER ORDERED that Section 73.3513 of the Commission's Rules IS AMENDED, as set forth in Appendix "B", effective February 20, 1986.

124. IT IS FURTHER ORDERED that new Section 73.1015 BE ADDED to the Commission's rules as set forth in Appendix "B", effective February 20, 1986.

125. IT IS FURTHER ORDERED that all applicable FCC Forms WILL BE AMENDED by subsequent Commission action, in accordance with the provisions in the *Report and Order and Policy Statement*.

126. IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE this Report and Order and Policy Statement to be printed in the FCC 2d Reports.

127. Action herein is taken pursuant to Sections 4(i), 303(r), 308(b), 312, 319(a) and 403 of the Communications Act of 1934, as amended.

128. For further information regarding this proceeding, contact David L. Donovan or Andrew J. Rhodes, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX "B"

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read:

Sections 4(i), 303(r), 308(b), 312, 319(a) and 403 of the Communications Act as amended

2. 47 CFR, Part 73, is amended by adding a new section (§ 73.1015) to read as follows:

§ 73.1015 Truthful written statements and responses to Commission inquiries and correspondence

The Commission or its representatives may, in writing, require from any permittee or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material ommission bearing on any matter within the jurisdiction of the Commission.

NOTE: Section 73.1015 is limited in application to written matter. It implies no change in the Commissions existing policies respecting the obligation of applicants, permittees and licensees in all instances to respond truthfully to requests for information deemed necessary to the proper execution of the Commission's functions.

3. 42 C.F.R. Part 73, Sub. § 73.3513 is amended by revising paragraph (d) to read as follows:

§ 73.3513 Signing of Applications

* * * * *

[d] Applications, amendments, and related statements of fact need not be submitted under oath. Willful false statements made therein however, will be considered a violation of § 73.1015, are also punishable by fine and imprisonment, U.S. Code, Title 18, Section 1001, and by appropriate administrative sanctions including revocation of station license pursuant to Section 312(a)(i) of the Communications Act.

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4. 47 C.F.R., Part 73 § 73.4280 is revised to read as follows:

§ 73.4280 Character evaluation of broadcast applicants.

See Report and Order and Policy Statement, Gen. Docket 81-500, BC Docket 78-108, FCC 85 648, adopted Dec. 10, 1985, 51 FR (3049 1986)

Application, Dismissal of
Delay, Improper
Findings and Conclusions by Parties

Review Board affirmed ALJ's interlocutory ruling which dismissed an application with prejudice for failing to show good cause for filing proposed findings of fact and conclusions of law 12 days after the mandated deadline. Applicant's serious and prejudical filing dilatoriness was several months in the making and typical of a general intractability in a complex, multi-party proceeding.

— *Cuba-American Limited*
MM Docket 85-27

FCC 85R-99

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

CUBAN-AMERICAN LIMITED et al.

For Construction Permit for a New
Television Station on Channel 35
Miami, Florida

MM Docket
No. 85-27
File No.
BPCT-840921KE

MEMORANDUM OPINION AND ODER

Adopted: December 11, 1985; Released: December 17, 1985.

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed October 29, 1985 (and supplemented on October 30, 1985) by Comuni-Centre Broadcasting, Inc. (Comuni-Centre) from a Memorandum Opinion and Order released October 9, 1985 (FCC 85M-3938) by presiding Administrative Law Judge (ALJ) Walter C. Miller. That ruling dismissed Comuni-Centre's application with

prejudice for failing to show good cause, pursuant to Section 1.263(c) of the Commission's Rules, 47 CFR 1.263(c), for filing its proposed findings of fact and conclusions of law 12 days after the mandated deadline. The ALJ concluded that Comuni-Centre's "dilatory tactics" were typical of its conduct throughout the proceeding, that the delay had prejudiced the rights of the 12 other applicants who timely filed, and that it would be deemed a waiver of Comuni-Centre's right to participate further, citing *James E. Reese*, 45 FCC 2d 315, 29 RR 2d 903 (Rev. Bd.), *rev. denied*, FCC 74-634 (Comm'n 1974). FCC 85M-3938, *supra*, at paras. 9, 10 and n. 2. Oppositions to the appeal have been filed by competing applicants Range Communications, Limited Partnership; Minority Broadcasting Corporation, Inc.; Lamar Communications, Inc.; First Latin Women Broadcasting, Inc.; Miami Broadcasting, Inc.; and Grace Broadcasting Network, Inc. We affirm the dismissal of Comuni-Centre's application.

2. Comuni-Centre's appeal presents two questions — whether the ALJ acted within the scope of his authority under Section 1.263(a) of the Rules, 47 CFR 1.263(a), in setting September 11, 1985 as the filing deadline for proposed findings herein, and whether he properly exercised that authority when he denied Comuni-Centre's September 23, 1985 motion to accept its late-filed findings and dismissed its application. As to the filing date, Comuni-Centre strenuously argues that the 55 days allowed between July 18, 1985 — the last day of hearing and the day that record was closed — and September 11 did not, as a matter of law, constitute the "reasonable opportunity" to submit proposed findings envisioned by Section 8(b) of the Administrative Procedure Act of 1946, 5 U.S.C. 557(c). In support, it presents a study of 80 FCC adjudications over the last two years, in only 28 of which findings were required to be filed in 55 days or less after the close of the record, and points out that all of those cases had much shorter transcript records (27-1346 pages versus the 4325 pages in the instant case). Comuni-Centre asserts that, given its mammmoth task, the 67 days it took to submit its findings were reasonable *per se*.

3. We reject Comuni-Centre's lesson in legal mathematics. The most telling statistic, which it did *not* emphasize, is that, regardless of how arduous the task, all 12 of its opponents managed to meet the September 11 deadline. We further note that the September 11 date itself represented an extension of time from a previous September 4 deadline; that the extension request, granted in part by Order, FCC 85M-3409, released August 30,

1985, was initiated by Comuni-Centre, which actually petitioned for a September 18 filing date; and that Comuni-Centre even missed that self-imposed deadline by five days. Finally, we observe that Section 1.263(a) of the Rules establishes 20 days after the record is closed as the standard filing time for proposed findings in Commission proceedings "unless additional time is allowed." *Id.* Here, 35 additional days were given. Moreover, the ALJ had alerted all parties as early as June 25, 1985 about the need to begin working on their findings then and not to wait until the hearing ended in July. Tr. 4038. Indeed, more than 90% of the hearing transcript had transpired by that date. Yet Comuni-Centre counsel concedes that it did not commence work on the findings until August 21, 1985, only two weeks before the original due date. It's no wonder that counsel felt obliged to seek a two-week extension (see above) on August 28. Under such circumstances, we are unable to conclude as a matter of law that the September 11 filing deadline was unreasonably short.

4. Comuni-Centre urges, in the alternative, that even if the September 11 date was theoretically adequate, the ALJ erred in holding that Comuni-Centre lacked good cause for its 12-day filing delay. We have carefully reviewed the showing proffered by Comuni-Centre in its September 23, 1985 motion to accept its findings and affirm the ALJ's conclusion that Comuni-Centre failed to show good cause for its dilatoriness under the applicable "special circumstances" standard. *See James E. Reese*, *supra* (10-day-late findings rejected where special circumstances not present); *Joseph M. Ripley, Inc.*, 18 RR 217, 222 and 18 RR 363 (1959) (lengthy illness of counsel during findings preparation period was not special circumstances). Comuni-Centre's motion vaguely details a number of work priority reasons why counsel did not begin preparation of the subject findings until August 21, 1985, but leaves unanswered why additional staff was not enlisted or priorities otherwise arranged. In addition, no explanation is offered for counsel's failure to keep the ALJ apprised about its work efforts as the September 11 deadline approached and passed; no further extension was requested, and counsel did not even meets its September 18 self-imposed filing goal (see paragraph 3, *supra*). Finally, we agree with the ALJ that Comuni-Centre's unauthorized filing delay gave it an unfair opportunity to review the timely filings of its 12 opponents and disrupted its opponents' preparation of reply findings. Contrary to Comuni-Centre's rejoinder, what concerned the ALJ (and us) is not the possibility that Comuni-Centre might *adopt* the findings or conclusions of others,

but rather that it had an unauthorized extra opportunity to *rebut* its opponents' arguments when fashioning its original findings and conclusions, as well as in preparing its reply findings and conclusions. As to disrupting the reply process, we note Minority Broadcasting Corporation's assertion that no applicants addressed Comuni-Centre's findings in their replies, even though those findings had not yet been rejected by the ALJ when replies were due on October 3, 1985. Thus, although its opponents technically had ten days to address Comuni-Centre's findings, the apparent absence of any replies (a most unusual event) certainly implies that Comuni-Centre's tardiness indeed had a confusing and disruptive effect on this proceeding. Were we to accept Comuni-Centre's findings now, we would feel obliged to set a special reply date to overcome this disruption, which would, in turn, create further disruption.

5. We are cognizant of the dangers in applying the "blunderbuss" of dismissal on account of procedural deficiencies.[1] However, we must also be sensitive to the administrative imperatives of multi-party proceedings, such as the instant case, and to the wages of a cavalier attitude toward the hearing process. In *Community Coalition for Media Change*, 646 F.2d 613, 616 and n. 3 (D.C. Cir. 1980), the Court criticized the appellant's "ultra-casual method of proceeding . . . [which] impedes the just, speedy, and inexpensive disposition of judicial business" and opined that dismissal of the appeal might have been appropriate because of the "conspicuous disregard . . . shown for case-processing rules." There, as here, petitioner failed to file its pleadings within the extended time allowed by the tribunal and ultimately responded only in the wake of a motion to dismiss.[2] And there, as here, a pattern of casual and dilatory conduct was noted by the tribunal. Thus, our action herein is not based on the type of inconsequential, trivial, or otherwise excusable single lapse toward which the Court noted disapproval of the drastic remedy of dismissal in *Jackson* v. *Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1977). We commend the ALJ for his expert and expeditious handling of this complex proceeding, *also see Mobilfone Communications*, 95 FCC 2d 668, 673 n. 4 (Rev. Bd. 1983), *rev. denied*,

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[1] *See WADECO, Inc.* v. *FCC*, 628 F. 2d 122, 133 (D.C. Cir. 1980) (Dissenting opinion of Mikva, J. inveighing against indiscriminate use of "blunderbuss of disqualification" in other than egregious applicant misconduct cases).

[2] In the instant case, the ALJ's dismissal of Comuni-Centre's application was partially in response to Range Communications' September 17, 1985 motion to dismiss. This motion apparently triggered the September 23 filing of Comuni-Centre's findings as well as its opposition to the motion.

FCC 84-610 (Comm'n 1984), *aff'd per curiam*, No. 85-1005 (D.C. Cir. November 29, 1985), and hold that Comuni-Centre's serious and prejudicial filing dilatoriness, which was several months in the making and typical of a general intractability in this proceeding, has caused it to forefeit its right to participate further.[3] *James E. Reese, supra.*[4]

6. ACCORDINGLY, IT IS ORDERED, That the Appeal From Ruling Dismissing Application with Prejudice, filed by Comuni-Centre Broadcasting, Inc. on October 29, 1985 and supplemented on October 30, 1985, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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[3] We distinguish this decision from our companion action in *Horizon Community Broadcasters, Ltd.*, FCC 85R-100, also released today, in which we reversed the dismissal of an application where the belated proposed findings were submitted only six days late, allegedly due to a substantial computer word processing malfunction, no pattern of intractable conduct was established, and the ALJ acted without waiting for the applicant's response to the dismissal motion.

[4] In *Community Coalition for Media Change, supra*, at 616 n. 3, the Court noted that where dismissal would unfairly penalize clients for the neglect of their attorneys, measures directed against dilatory counsel are available, citing *Butler* v. *Pearson*, 636 F.2d 526 (D.C. Cir. 1980), in which counsel was ordered to pay the reasonable expenses of the litigation which his neglect had engendered. Here, we do not believe that Comuni-Centre may properly escape responsibility for its counsel's dilatoriness, since the filing deadline and prior litigation history were known (or should have been known) by the applicant's principals as well as its counsel. *See Vela Broadcasting Co.*, FCC 85R-93, released November 15, 1985 (Rev. Bd.).

Common Carrier, Rates
Common Carrier, Resale

Petition for declaratory ruling granted in part to clarify the tariff treatment of nonpremium access in multicarrier exchange areas. Secondary exchange carrier may bill OCC or reseller separately and may use surrogate tariffic data in costing and tariffing.
— *Extended Area Service*

FCC 85-644

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Amendment of Part 69 of the Commission's Rules to Ensure Application of Access Charges to All Interstate Toll Traffic	RM 5056

MEMORANDUM OPINION AND ORDER AND REQUEST FOR SUPPLEMENTAL COMMENTS

Adopted: December 10, 1985; Released: December 31, 1985

BY THE COMMISSION:

I. Introduction

1. The Commission has before it two petitions relating to access compensation for nonpremium access in multicarrier extended area networks. The first of these is the May 9, 1985, petition for declaratory ruling filing by the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), in which it requests a determination of the methodology for the division of revenues derived from the joint provision of exchange access under extended area service (EAS) arrangements[1] and over foreign exchange (FX) lines.[2] The second is the

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[1] In an EAS arrangement, a customer in one exchange can call a local number in

June 7, 1985, petition for rulemaking filed by the Exchange Carrier Industry Group (Industry Group), which is comprised of the United States Telephone Association (USTA) and the National Telephone Cooperative Association (NTCA), requesting amendment of Part 69 of the Commission's Rules[3] to correct alleged deficiencies in the structure and application of the Commission's access charge plan.[4] The Commission has also received an informal request for relief from the Richmond Telephone Company raising similar concerns. We consolidated the petitions for purposes of receiving comments from interested persons.[5] Comments were filed by more than thirty-five parties, and reply comments were filed by more than twenty parties.[6]

2. The underlying premise of both petitions is that the existence of a multicarrier EAS network permits resellers and facility-based other common carriers (OCCs)[7] to obtain access services from all exchange carriers in the EAS area. The petitioners

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another exchange that is part of the extended area without paying a toll charge. An exchange subscriber in one exchange can therefore access an interexchange carrier's network toll free by calling its seven-digit access number even when that number is located in a different exchange. Exchange switches typically recognize such calls as EAS calls, not as interexchange calls for which access charges are applicable.

[2] Subscribers to FX service obtain a private line from the subscribes premises to a switch in another exchange area and are assigned a local telephone number in the "foreign exchange." Before the access charges were implemented, an interstate FX subscriber paid two bills for the service — a private line charge for the intercity private line and a business exchange service or B/1 charge in the distant city. The B/1 charge has now been replaced by access charges at the open end to compensate the local exchange carrier at the open end for the use of the local switch and the subscriber line. Special access is assessed for the exchange portion of the dedicated line at the closed end.

[3] 47 C.F.C. Part 69.

[4] *See* MTS and WATS Market Structure Inquiry (Phase I), 93 FCC 2d 241 (1983) (*Access Charge Order*), *modified on recon.*, 97 FCC 2d 682 (1983) (*First Reconsideration Order*), *modified on further recon.*, 97 FCC 2d 834 (1984), *affirmed in principal part sub nom.* National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3583, 3595 (U.S. Feb. 19, 1985), *modified on further recon.*, 49 Fed. Reg. 46383 (1984), *recon. denied*, 50 Fed. Reg. 18249 (1985), *further recon. denied*, 50 Fed. Reg. 43707 (1985), *appeal pending sub nom.* U.S. Telephone, Inc. v. FCC, No. 84-1115 (D.C. Cir. filed Mar. 23, 1984).

[5] *See* Public Notice, mimeo No. 5286 (released Jun. 20, 1985).

[6] USTA, NTCA, and OPASTCO filed a motion to accept their joint comments one day late, in which they explained that their delay in filing was the result of the need to coordinate the comments between the three organizations. Since no delay was caused and since no party will be harmed by the consideration of their comments, the motion is granted.

[7] The term "OCCS", as we generally use it, encompasses both resellers and facilities-based interexchange carriers other than the American Telephone and Telegraph Company (AT&T). For purposes of this *Order*, however, it will aid our discussion of the issues to limit the term to facilities-based carriers.

submit that the reseller or OCC pays Feature Group A (FGA), Feature Group B (FGB), or the business line charges to the primary exchange carrier,[8] while the secondary exchange carrier[9] typically receives no compensation for the use made of the traffic-sensitive facilities associated with the interstate call transiting the EAS facilities.[10] Specifically, petitioners allege that this occurs in three circumstances:[11] (i) when an OCC uses FGA connections in the primary exchange as its means of interconnection; (ii) when a reseller pays the business line rate in conjunction with the resale of WATS; or (iii) when a FGB connection at an access tandem is used to connect a customer in a subtending exchange in the same LATA (Local Access and Transport Area).

3. The Industry Group contends that the routing of interstate calls over EAS facilities uses additional exchange access facilities and causes additional costs for the exchange carrier, which they contend should be recovered in access charges. Since an exchange carrier cannot tell whether a call transiting EAS facilities is actually an EAS call or whether it is a toll call, the petitioners submit that the costs of the facilities associated with a toll call are not being included in access costs, and thus the exchange carriers are not receiving distributions from the National Exchange Carrier Association (NECA) traffic sensitive pool that reflect such costs. They assert that these deficiencies in the access charge plan allow some interexchange carriers to escape the payment of access charges for exchange carrier services identical in function to interstate services, artificially increase EAS exchange usage and decrease the toll allocation factors of affected exchange carriers,[12] and create substantial economic and network

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[8] A primary exchange carrier is the exchange carrier in whose exchange the OCC or reseller obtains its POP, *i.e.*, the exchange in which the FGA or FGB connection is made.

[9] The secondary exchange carrier is any exchange carrier in whose exchange a FGA or FGB connection is not made, but from whose exchange customers can call the POP of an OCC or reseller in the primary exchange. FGA traffic is normally routed over an EAS trunk between the switches of the primary and secondary exchange carriers.

[10] Average schedule companies may be impacted in their recovery of the nontraffic sensitive (NTS) subscriber plant costs as well.

[11] Several commenting parties indicate that a problem exists as well in a three exchange situation if exchange A and exchange B have an EAS agreement, and exchange B and exchange C have an EAS agreement, but exchange A and exchange C do not. A reseller or OCC, in this situation, may be able to resell service between exchange A and exchange C and pay only the business line rate to exchange B.

[12] This has resulted in upward pressure on exchange rates to cover the additional costs of the EAS facilities used in providing interstate access to the OCCs and resellers.

inefficiencies due to the additional demand placed on the EAS facilities and the reduced demand on the toll trunks.

4. The Industry Group also contends that the business line rate charged resellers of WATS provides inadequate compensation for the use these parties make of the exchange access facilities. They propose that the Commission replace the business line rate charged to resellers and the prorated share of switched access rates to business line rates for mixed-mode resellers based on WATS usage with an FGA rates. OPASTCO asserts that similar problems are associated with the closed end of an FX line used to access an OCC in another exchange. This allegedly occurs because FX lines are assigned to the intrastate jurisdiction, while the traffic is interstate, and the secondary exchange carrier receives no access compensation for the use made of its facilities.[13]

5. The Industry Group states that "[u]ntil such time as meet point billing becomes feasible for Feature Group A and B switched access services, the billing [exchange carrier] should take the access settlements of all [exchange carriers] involved in the arrangement into consideration in the development of its rates for services provided over joint facilities."[14] To this end, they request that this Commission indicate that such settlement payments, properly supported, will be accepted in the review of the exchange carriers' tariffs. According to the Industry Group, the revenues and costs associated with the secondary exchange carriers' provision of joint access, based either on actual usage measure-

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[13] This does not appear to be an EAS problem. The exchange carriers are compensated for the closed ends of interstate FX lines at special access rates. We recently held that interstate tariff rates are to be applied to private lines if both interstate and intrastate traffic are being carried over a single line. *See* Chesapeake and Potomac Telephone Company of Maryland, FCC 85-465 (released Aug. 16, 1985); American Telephone and Telegraph Co., FCC 85-368 (released Jul. 25, 1985). Since the jurisdictional assignment of costs in the separations procedures follows the jurisdictional use of the facility, these decisions should also resolve this problem.

Special issues arise in the case of an average schedule company, however, since if a shift in messages from toll to the FX service occurs, it may receive less compensation from the NECA carrier common line pool for its subscriber lines than previously because it will receive special access for the closed end rather than the per minute amount of average settlement for the minutes that are now transiting the FX line. NECA has recently proposed revised average schedules that would adjust the compensation for the common line portion of switched access service to be based on access lines rather than messages. The revised average schedule is being reviewed by the Commission. *See* Public Notice, Mimeo No. 0189 (released Oct. 9, 1985). We believe any concerns about the FX relationship are more appropriately raised in that proceeding.

[14] Industry Group Petition at 21.

ments or upon an agreed surrogate, should be recognized as part of the interstate ratemaking and NECA pooling processes. OPASTCO requests that we specify an interim mechanism for dividing access revenues earned in the joint provision of access over EAS and FX lines between primary and secondary exchange carriers. Finally, it requests that retroactive relief be awarded.[15]

6. As a permanent resolution, the Industry Group proposes that the Commission (i) permit exchange carriers to institute an access rate structure that recognizes all costs associated with interstate access in the cases of FGA and FGB interconnections; (ii) require each reseller to identify itself as such to the primary exchange carrier and provide that exchange carriers with specified data on projected and actual usage; (iii) require the primary exchange carrier to provide the previously identified data to the secondary exchange carrier; and (iv) permit exchange carriers to route resellers' and OCCs' traffic over facilities designed for toll traffic if technologically feasible, or other facilities the exchange carrier determines to be appropriate. The Industry Group states that the modifications proposed will insure that access charges both accurately reflect all costs that should be included in interstate revenue requirements and properly apply access charges to all interexchange carriers for their use of the exchange access network. They further assert that these modifications will permit proper network design and control practices in order to provide the best possible service to all customers.

7. In this *Order*, we grant in part the request for a declaratory ruling.[16] While our present access charge rules are sufficient, in

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[15] Several parties state that the three associations involved in the petitions are conducting ongoing discussions and urge this Commission to allow the industry members to resolve the interim and retroactive problems among themselves. Representatives of the parties involved in the negotiations recently advised the staff of the Common Carrier Bureau that considerable progress was being made and that an industry agreement could be submitted in the near future. Accordingly, we shall defer any action on the requests for interim action and for retroactive relief while progress is being made among the affected parties to resolve these issues. We strongly encourage this attempt to reach an industry agreement to share the access revenues already collected in an equitable manner. As a prospective matter, any interim resolution proposed by the industry and accepted by this Commission would be incorporated in access tariffs. We are herein ordering USTA to report monthly to the Chief of the Common Carrier Bureau on the progress of the industry negotiations. We direct USTA to file any agreement that may be reached between the exchange carriers with this Commission, after which we will invite comment on the agreement from interested persons.

[16] Section 1.2 of the Commission's Rules provides that the Commission may issue a declaratory ruling "terminating a controversy or removing uncertainty." 47 C.F.R. S1.2.

our view, to resolve the problems identified by petitioners, the record in this proceeding indicates that a degree of uncertainty exists among carriers concerning the joint provision of access services in multicarrier situations. Accordingly, we take this opportunity to clarify the manner in which exchange carriers should treat the costs of facilities used in providing interstate access services to OCCs and resellers in multicarrier situations. In light of this clarification and the upcoming Notice of Proposed Rulemaking addressing, *inter alia*, the amendment of the access charge rules to respond to the recent recommendation of the Federal-State Joint Board in CC Docket No. 78-72 and CC Docket No. 80-286 to directly assign WATS access lines,[17] we are also inviting interested persons to file further comments on whether amendment of Part 69 of the Rules is still believed to be necessary.

8. As noted above, the Federal-State Joint Board has recommended that the separation rules be amended to provide that the cost of WATS access lines be directly assigned to the appropriate jurisdiction, rather than treated as jointly used plant that is allocated in the same manner as subscriber lines. We will in the near future be initiating a rulemaking proceeding to determine what modifications to the access charge rules are appropriate to reflect the effects of the direct assignment of WATS access lines. Since the rationale for a reseller paying the business line rate in conjunction with the resale of WATS is related to the switched access charges that are now paid for WATS access, we shall defer consideration of the appropriate treatment of access charges for WATS resellers to the forthcoming rulemaking proceeding.

II. Background

9. The use of EAS facilities in connection with interstate calls existed prior to the promulgation of the access charge rules. FX subscribers have always had access to the entire extended area at the open end of such lines. In the ENFIA (Exchange Network Facilities for Interstate Access) proceedings, the parties recognized that EAS facilities would be used in the origination and termination of interstate calls over the OCCs' networks and provided for a surcharge to reflect the need to compensate the secondary exchange carrier for the use of its facilities.[18] Finally,

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[17] MTS and WATS Market Structure and Amendment of Part 67, 50 Fed. Reg. 47765 (Nov. 20, 1985).

[18] Exchange Network Facilities for Interstate Access, 71 FCC 2d 440 (1979).

in *Northwestern Bell Telephone Company,*[19] we held that an EAS agreement between two exchange carriers did not apply to the use of the EAS facilities for the origination or termination of MTS/WATS equivalent services.

10. When we adopted the access charge rules, we specifically addressed the question of how these rules would apply to EAS networks. The *Access Charge Order* stated:

> If an extended area arrangement exists, an interexchange carrier that interconnects with any local exchange carrier in the extended area necessarily obtains access to the entire extended area. The local exchange carriers are essentialy providing a joint access service. Therefore, we will not permit any local exchange carrier to file separate traffic sensitive tariffs for a portion of an extended area. We will permit carriers in an extended area to file a joint tariff for traffic sensitive elements that differs from any national common tariff if all of the participating carriers concur in the rate and agree upon an apportionment of revenues. Such a joint tariff must, of course, reflect the combined costs of all participating carriers.
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> 322. If carriers in an extended area cannot agree upon a rate for a particular area, common tariff arrangements that have been established nationally will have to be used for that purpose. Such a requirement is necessary to assure that some access charge will be effective in all areas even if the participating exchange carriers cannot agree upon rates or the division of revenues.[20]

11. In the *First Reconsideration Order*, we addressed concerns raised by many exchange carriers that under these procedures one carrier could prevent another from filing separate tariffs for traffic sensitive elements because of the requirement that all carriers participating in an extended area arrangement concur in the separate tariff. In that *Order*, we eliminated the requirement that carriers participating in extended area arrangements either file a joint tariff or concur in the NECA tariff charges for traffic sensitive access elements. We also established procedures for use in developing traffic measurement surrogates if actual measurements were not possible. We said:

> 192. Transport and switching of interstate traffic originating or terminating in an extended area will still be deemed access services. If exchange carriers providing access services in an extended area cannot agree on a formula for the division of access revenues generated from jointly provided access services, each may simply bill and collect separately for the access services it provides. Separate charges are clearly feasible for services such as MTS that have traditionally been provided through direct connections with a Class V switch. The telephone companies have apparently ignored extended area arrangements in computing MTS, WATS, and most private

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[19] 92 FCC 2d 625 (1982); *see also* Sugarland Telephone Company, FCC 85-364 (released Aug. 1, 1985).

[20] 92 FCC 2d at 329-30.

> line settlements. The extended area problem is largely confined to services that use line-side connections. If a line-side connection terminates in a particular Class V switch in an extended area, it may be difficult to determine whether a call terminated or originated in a telephone that is served by that switch or a telephone that is served by a Class V switch in the adjacent exchange. Separate traffic sensitive charges for interstate services using line-side connections become feasible if some formula is devised for attributing originations and terminations to each exchange in the extended area, even if the actual path of some calls cannot be traced. We have decided that the following formula should be used in the absence of an agreed formula.
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> 193. When one or more carrier participating in an extended area arrangement do not have an agreed formula for the division of access revenues for traffic sensitive elements, and do not both participate in the [NECA] tariffs recovery of traffic sensitive costs, we shall require that each carrier in the arrangement cooperate in the tracing of paths of interstate calls whenever such paths can be traced . . . . For purposes of computing charges for access service provided in extended areas in which at least one telephone company is not concurring in the Association tariff, originations and terminations of interstate services through line-side interconnections shall be apportioned among and offices in the extended area based on the relative number of main stations connected to, or if that number cannot be determined, the relative number of access lines terminating at each of these end offices. [footnotes omitted.][21]

No party sought reconsideration of this resolution of the EAS aspect of the access charge rules.

III. Discussion

12. In adopting the access charge plan, we sought to develop a mechanism that would permit exchange carriers to identify their costs associated with interstate access and that would provide a structure for the recovery of those costs from either end users or interexchange carriers. Our clear intent was that this cost identification and recovery process would include the costs of interstate access arising from the use of EAS facilities, whether in a single carrier environment or in a multicarrier arrangement. The comments indicate that some uncertainty exists as to the manner in which access usage was to be measured in multicarrier EAS areas and reflected in the costing and tariffing processes. As a result of this uncertainty, it appears that secondary exchange carriers are not being properly compensated in many cases for the costs associated with the traffic-sensitive facilities in the EAS network.[22]

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[21] First Reconsideration Order, 97 FCC 2d at 758–59.

[22] For average schedule companies, a recovery problem may exist for NTS costs as well. *See* Subsection D, *infra*.

13. The functioning of the interstate access charge plan depends in the first instance on traffic measurements to establish cost allocations and to determine the proper amount to be billed. Exchange carriers in some instances have difficulty in measuring the number of originating or terminating minutes of interstate access use transported on EAS facilities. (Indeed, it appears that such traffic is erroneously treated as local calling.) Without traffic data, the exchange carriers are unable to determine the share of the EAS facilities that should properly be allocated to the interstate jurisdiction and are thus unable to develop the revenue requirements for all the costs of interstate access service. Furthermore, this inability to identify interstate usage of EAS facilities has led to the apparent underrecovery of access revenues by exchange carriers. In this *Order*, we clarify the measurement approach of the *First Reconsideration Order*, the process of allocating costs between jurisdictions, and the administration of interstate access tariffs.[23] Finally, we address several miscellaneous points raised in the comments.

A. Measurement Issues

14. The use of actual traffic data in all instances of cost allocation and access tariff administration would be preferable. However, it is not always possible to measure traffic to and from a specific exchange.[24] Therefore, if measurement is not possible or

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[23] The Municipality of Anchorage, dba Anchorage Telephone Utility (ATU), proposes authorizing the secondary exchange carrier to block interstate traffic transiting EAS facilities in those situations in which the exchange carriers have the technical ability to block the traffic. As discussed above, interstate services for many years have utilized EAS facilities to originate or terminate interstate calls. ATU has not shown any policy rationale for prohibiting this practice today. Such an approach would impose restrictions on the customers' use of a service and would limit the development of competitive markets because of the restricted penetration that would be available to the OCCs or resellers. In many areas, this may be the principal means of delivering some of the benefits of competition. Moreover, if by some study procedure, or through a surrogate measure, proper cost allocation and compensation mechanisms exist, there is no reason to impose such a restriction. As discussed *infra*, such mechanisms are available under the present access charge and separation rules and access tariff procedures. Accordingly, ATU's proposal is rejected.

[24] It appears that most terminating FGA traffic can be identified as to terminating exchange. Furthermore, most FGB originating and terminating traffic can also be identified by exchange. *See* Petition for Waiver Concerning the 1985 Annual Access Tariff Filing, Mimeo No. 5007 (released Jun. 7, 1985) (*1985 Waiver Order*). The primary exchange carrier will in most cases be the one that will have such traffic data, not the secondary exchange carrier. Thus, it will be necessary for the primary and secondary exchange carriers in multicarrier EAS networks to cooperate in the development and sharing of the data to permit the proper application of separations procedures and administra-

feasible, the use of surrogates is necessary until actual data exists or alternative study procedures are developed.[25] Many parties urge the Commission to enforce the relative access line allocation approach of the *First Reconsideration Order*.

15. The development of a surrogate for FGA or FGB traffic has two distinct, but interrelated, elements. First, it is necessary to determine the jurisdictional split of the nonpremium, interexchange traffic originating or terminating in the extended area. A Federal-State Joint Board is currently investigating the problems associated with the jurisdictional identification of traffic utilizing FGA or FGB interconnections.[26] Second, it is necessary to allocate the nonpremium interstate access minutes among the exchanges in the extended area.[27] This second aspect of the problem is what was under consideration in the *First Reconsideration Order* and is the subject of this *Order*.

16. In the *First Reconsideration Order*, we identified one possible surrogate that we would accept if the traffic could not be measured and if the exchange carriers could not agree. That method was to use relative main stations or relative access lines to allocate total interstate nonpremium minutes among exchange

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tion of access charge tariffs.

[25] Several parties assert that equipment exists that is capable of measuring calling over EAS facilities to OCC numbers. However, as other commenting parties note, such equipment is expensive and can be very time-consuming to use. The cost for many small companies of purchasing and using such equipment may outweigh the benefits to be derived from having the measurements. This is especially true for those carriers intending to install digital equipment that will be capable of measuring such traffic in the near future. We do not desire to impose burdensome costs on small companies in an attempt to obtain perfect data. Therefore, the development of study procedures or a surrogate allocator for the actual traffic development of study procedures or a surrogate allocator for the actual traffic measurement is necessary. However, exchange carriers could share measuring equipment to perform periodic studies, thereby reducing the cost to any one carrier.

[26] Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, FCC 85-196 (released Apr. 25, 1985).

[27] Several parties have suggested we refer the issues associated with the allocation of interstate access minutes among exchange carriers in an EAS network to the Joint Board because it is necessarily implicated in resolving the jurisdictional allocation of the FGA and FGB traffic. We find such a referral unnecessary. Pending the Joint Board's recommendation and Commission action thereon, interstate usage is being estimated by treating as interstate those calls that enter the OCC network in a different state than the terminating dial telephone station. *See* MCI Telecommunications Corporation, FCC 85-145 (released Apr. 16, 1985), *recon. denied*, FCC 85-595 (released Nov. 13, 1985). We find that this estimation technique is applicable to OCC traffic that transits EAS facilities. Furthermore, the conclusions reached in the Joint Board proceeding should be readily substitutable for this estimation technique. Thus, we intend that the same jurisdictional allocation approach should apply to OCC nonpremium minutes, whether or not they use EAS facilities.

carriers in the extended area for situation in which at least one carrier was not a part of the NECA traffic sensitive pool.[28] Since our policies already permit the use of relative access lines in apportioning originating or terminating access minutes in multicarrier EAS arrangements, it is unnecessary to take further procedural actions beyond this clarification.[29]

17. While we have identified one acceptable allocation method, we recognize that other alternative approaches to the development of a surrogate traffic measurement may be appropriate. We acknowledged this when we indicated that the relative main station or relative access line approach was to be used if exchange carriers involved in providing joint access over EAS facilities could not agree on an apportionment method. One alternative surrogate measure suggested in the record of this proceeding is to develop a ratio of originating to terminating traffic in those cases in which terminating traffic can be measured. Since a particular surrogate may not be equally representative of traffic patterns in every situation, a reasonable degree of exchange carrier discretion to develop more appropriate surrogate measures is desirable. Any alternative surrogate developed would, of course, have to be properly justified in the tariff review process.

B. Cost Allocation Issues

18. Access charges are designed to recover all costs associated with the provision of access services. For companies that settle on the basis of costs, the interstate costs that are reflected in their access tariffs are determined by the separations procedures contained in Part 67 of the Rules.[30] The NTS costs of subscriber line plant are allocated to the interstate jurisdiction pursuant to frozen SPF (subscriber plant factor), or after January 1, 1986, pursuant to the transitional allocation plan leading to an eventual twenty-five percent allocation.[31] Thus, no special separations procedures are necessary to account for the EAS use of the

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[28] The relative main station or relative access line surrogate is consistent with the use of a subscriber line ratio in determining the number of originating and terminating minutes of use that are to be charged premium rates when some end offices in a local calling area have been converted to equal access and some have not. *See 1985 Waiver Order* at 34-40.

[29] If a secondary exchange carrier is a participant in two EAS arrangements involving interstate traffic, the secondary exchange carrier's access line count shall be divided between the two EAS areas based on the relative total access lines in the two primary exchange areas without considering the access lines of the secondary exchange carrier.

[30] 47 C.F.R. part 67.

[31] Amendment of Part 67, 50 Fed. REg. 939 (Jan. 8, 1985).

subscriber plant in conjunction with interstate calling.[32]

19. In the case of traffic sensitive plant and related expenses, traffic measurements or surrogate factors are used in the separations process to assign the costs to the interstate jurisdiction for recovery through interstate access charges. The commenting parties generally contend that EAS facilities today are directly assigned to the intrastate jurisdiction because of problems with the measurement of interstate usage. However, the comments also indicate that no modifications are required to the separations rules to correct this misassignment of costs. The National Association of Regulatory Utility Commissioners (NARUC) presents the situation as follows:

> Currently, all costs relating to the provision of interstate access in the [EAS situations] are treated as local investments and none are allocated to the interstate jurisdiction. Yet, no substantive changes in Part 67 are necessary to remedy this situation. Correct accounting classifications already exist . . . The separations treatment could be corrected merely by allocating these categories between EAS local and interstate based on relative usage.[33]

This is echoed by the staff of the Michigan Public Service Commission (Michigan Commission) when it states that "Part 67 permits an allocation of EAS plant between state and interstate, but administratively such an allocation has not occurred."[34]

20. We agree with the comments that the separations rules provide adequate procedures to separate costs once the use of the facilities as part of an interstate service is recognized. It is well established that the use of EAS facilities in conjunction with FGA or FGB access service in connecting an end user to an OCCs' switch is properly assigned to the interstate jurisdiction if the call is interstate in nature.[35] In establishing a surrogate measure for interstate access over EAS facilities, we expected that the exchange carriers would apply these same measurements in the separations process to determine the appropriate interstate allocation. In any event, we make clar in this *Order* that exchange carriers may allocate costs to the interstate jurisdiction using actual traffic measurements, the relative access line surrogate as set forth in the *First Reconsideration Order*, or other appropriate

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[32] As of June 1, 1986, the case with respect to average schedule companies should substantially parallel the situation for cost companies if the revised average schedules are accepted. *See* Subsection D, *infra*.

[33] NARUS Comments at 3-4.

[34] Michigan Commission Comments at 3.

[35] *See* Northwestern Bell Telephone Co., 92 FCC 2d 625 (1982).

measurement surrogate, as discussed above. Moreover, an exchange carrier determining such an interstate cost allocation should include such amounts in its cost reports in the NECA traffic sensitive pool processes or in another traffic sensitive pool.[36] Accordingly, the record demonstrates that Part 67 does not require amendment.

C. Access Tariff Administration

21. The Industry Group, supported by numerous commenting parties, asserts that the use of EAS facilities to originate and terminate OCC interstate traffic increases the costs of such access and that OCCs should be required to compensate exchange carriers for these costs. The smaller exchange carriers generally contend that the Commission should establish a mechanism that requires the primary exchange carrier to share the access revenues it collects from OCCs with the secondary exchange carriers in multicarrier EAS situations. Central Telephone Company (Centel) asserts that the compensation problems arise because the secondary exchange carrier is not able to bill the interexchange carrier and must therefore resort to some type of revenue sharing arrangement with the primary exchange carrier to recover its access related costs. It states that exchange carriers that are able to identify the interstate traffic carried over FX lines and EAS trunks should simply bill and collect for the access services provided. For exchange carriers lacking this ability, Centel proposes that NTS costs associated with the EAS network be recovered directly from the end users, while traffic sensitive costs would be recovered through a plan that would have the originating primary exchange carrier compensate the secondary exchange carrier at the secondary carrier's traffic sensitive rates contained in its interstate tariffs. United Telephone System, Inc. (United), proposes a plan that would recover EAS costs associated with interstate access from the OCCs or resellers that make use of such access. The United plan would be administered by the primary exchange carrier.

22. MCI Telecommunications Corporation (MCI) argues that the petitioners have not demonstrated that the access charge tariffs cannot be made to work and thus have not demonstrated that any rule changes are required. OCC and reseller parties

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[36] Thus, if both carriers in an EAS situation are in the same pool, each carrier can recover its costs from the pool if it reports those costs to the pool. This will result in an automatic sharing of access revenues among those carriers.

generally argue that any problem that exists is limited to the determination of the manner access revenues should be divided among exchange carriers. AT&T asserts that it should not be required to pay any costs associated with EAS facilities used in conjunction with FGA or FGB interconnections because it does not use such service options.

23. In the *First Reconsideration Order*, we provided for two alternative methods for handling the administration of access tariffs in multicarrier EAS arrangements. First, exchange carriers in a multicarrier EAS area could agree on a division of revenues between themselves and include the costs in one tariff structure. From the comments, it appears that such agreement was reached in very few instances. Second, when an agreement between the two exchange carriers could not be reached, we indicated that each could bill and collect from the OCC individually. The record indicates that this option has not been widely implemented either.

24. For access charge purposes, costs associated with the use of EAS facilities for interstate calling are encompassed largely in the local switching, line termination, and transport elements.[37] The *First Reconsideration Order* contemplated that the charges to be billed by the secondary exchange carrier would be in addition to those charged by the primary exchange carrier since these costs are in addition to the primary exchange carrier's costs. While it is the secondary exchange carrier that is actually providing the subscriber line, we believe that the carrier common line element should be billed by the primary exchange carrier. Given the difficulties that secondary exchange carriers have encountered to date, this will ensure that the carrier common line charge is collected when it is applicable. Since the carrier common line element is pooled among all exchange carriers, the identity of the billing exchange carrier is not significant.

25. The actual mechanics of billing could be accomplished in several ways. The method contemplated by the *First Reconsideration Order* was for the secondary exchange carrier to present a bill to the OCC or reseller for the use made of its EAS facilities. This would mean that an OCC or reseller would receive two bills for the access minutes that transited, or were deemed to transit, EAS facilities in their origination or termination. A second method would be for the primary exchange carrier to bill the OCCs on behalf of the secondary exchange carriers based on an appropriate

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[37] In some instances, a secondary exchange carrier might provide additional interstate access service covered by another access charge element. In such cases, it could also charge for these elements.

interstate tariff (either the secondary exchange carriers own tariff or one of NECA's). The primary exchange carrier would include such amounts in the bill to the OCC or reseller.

26. The application by a secondary exchange carrier of an access charge in connection with FGA and FGB access raises a corollary question — that is, can a secondary exchange carrier in a multicarrier EAS arrangement charge a reseller for the traffic-sensitive elements just as the FGA or FGB connection is charged such an amount. The United EAS cost recovery proposal would apply an access charge to resellers for the use made of the secondary exchange carrier's traffic-sensitive EAS facilities in connection with the origination or termination of interstate calls. MCI contends, without distinguishing between multicarrier EAS situations and single company EAS situations, that to charge resellers directly for access would compel them to pay for access twice on the originating end of an interstate call.

27. Resellers obtain access by paying the business line rate when a service is resold for which the switched access charges have already been paid. This obviously provides the reseller with access to the primary exchange carrier's exchange network. However, it also provides the reseller with the capability of accessing the EAS facilities of the secondary exchange carrier in the origination or termination of interstate calls. Therefore, it increases the number of subscribers that can be accessed by one connection and imposes additional costs on secondary exchange carriers to provide facilities. The logic of allowing the secondary exchange carrier in a multicarrier EAS network to apply a separate access charge in the case of FGA and FGB applies equally to resellers. The business line rate correlates with the access charges assessed by the primary exchange carrier. The reseller is obtaining a benefit from the additional subscribers that can be accessed. We find nothing in our Rules that would prevent a secondary exchange carrier from applying a tariffed charge on resellers for the use made of a multicarrier EAS network. However, a secondary exchange carrier cannot apply a carrier common line charge to resellers using EAS facilities in a multicarrier EAS situation.

28. This clarification of the *First Reconsideration Order* should provide sufficient guidance to permit the exchange carriers or NECA to develop the necessary tariff provisions, if they do not already exist, and to permit the proper billing and collection of access charges. In this regard, we note that we recently granted a waiver of the meet point billing requirement for FGA and FGB

traffic.[38] To the extent the exchange carriers wish to pursue a division of revenues approach to implementing tariffs for the use of EAS facilities in multicarrier EAS situations, this waiver facilitates the process of accomplishing the sharing of access revenues. Therefore, we find it unnecessary to initiate a rulemaking proceeding at this time to modify the access charge rules to address the use of EAS facillities in multicarrier situations.

D. Average Schedule Company Considerations

29. As every party commenting on the issue recognizes, the use of EAS facilities for interstate access has somewhat different effects on average schedule companies than on cost companies. These differences arise principally from the fact that — unlike cost companies whose compensation for NTS plant costs from the NECA pool is based on frozen SPF and is therefore independent of the actual interstate usage over their facilities — average schedule companies currently are compensated for their NTS costs on a per toll message basis that does not recognize nonpremium OCC or reseller traffic in counting such messages. As a result, the average schedule companies receive no access compensation for NTS costs from OCC traffic using FGA or FB interconnections or reseller traffic using business lines for access. While this problem would exist for any OCC or reseller traffic carrier over average schedule company facilities, the use of EAS facilities exacerbates the problem since as a practical matter it appears that it is only through EAS arrangements that OCCs and resellers provide service to average schedule company areas.

30. Subsequent to the filing of comments, a revised average schedule plan was submitted by NECA. NECA proposes to implement this plan on June 1, 1986, and we have invited public comment. The plan makes several modifications in the manner average schedule companies would be compensated in the future. In particular, under the plan compensation for the NTS costs would be based on access lines rather than messages. This change should eliminate distinctions between cost and average schedule companies with respect to the effect of the use of EAS facilities for interstate calling on carriers recovery of NTS costs.

31. Average schedule companies, like cost companies, receive compensation for traffic-sensitive costs on a traffic-sensitive basis, although the exact mechanisms for such cost recovery are somewhat different. The plan submitted by NECA also includes

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[38] *1985 Waiver Order* at 3.

changes to the average schedule compensation formula for traffic-sensitive cost recovery. These changes generally appear to make average schedule compensation more closely parallel access charges.

32. As we noted earlier, we are currently receiving comment on the revised average schedule compensation plan. Any changes in that plan that might be necessary to compensate average schedule companies for costs associated with the use of EAS facilities for such OCC or reseller interstate access can be considered in that proceeding. Accordingly, we will not inquire into the revised plan herein. However, we note that the principles we have identified in this *Order* for cost companies should apply to the average schedule situation as well. This is particularly the case with respect to the use of a surrogate traffic measure for costing and tariffing. Furthermore, while we have held that carrier common line charges may not be assessed on OCCs or resellers by the secondary exchange carriers, this should not prevent average schedule companies from being compensated from the carrier common line pool on the basis of reasonable estimates of interstate useage carried over EAS facilities.

E. Miscellaneous issues

33. Several exchange carriers raise questions concerning the access charge compensation level that will apply when a secondary exchange carrier provides equal access and an OCC continues to access customers in the secondary exchange through FGA or FGB interconnections in the primary exchange. Several exchange carriers request that the Commission establish a rule that would provide that where an independent company in an EAS arrangement has the capability of providing equal access to OCCs and resellers, these carriers should be required to pay Feature Group D rates, minus a small differential for switching, when they voluntarily choose inferior interconnection arrangements.

34. The exchange carriers' point is well taken. When an exchange carrier converts to equal access, it should be compensated at the premium rate level. On the other hand, if the primary exchange is totally converted to equal access, but the secondary exchange is not, nonpremium rates should continue to apply to the FGA or FGB traffic in the latter exchange. We have permitted exchange carriers to implement a plan that allocates OCC interstate calls among premium and nonpremium rates when only a portion of the end offices in a local calling area are

converted to equal access. This formula can be adjusted to incorporate the EAS exchanges and thereby determine the number of minutes for which the premium rate must be paid. We leave it, in the first instance, to the exchange carriers to develop a formula to accomplish this allocation.

35. The Industry Group requests that several data reporting requirements be established to assure proper network design and adequate service levels. Each reseller would be required to identify itself as such to the primary exchange carrier and provide an estimate of usage for each end office the reseller intends to use and its estimated future capacity requirements, updated on an ongoing basis. They also request that resellers be required to provide a monthly report summarizing by each end office the minutes of use and messages for originating and terminating access by jurisdiction and by LATA. Finally, it is requested that the primary exchange carriers be required to provide the secondary exchange carriers with the FGA or FGB seven- digit access code the reseller will be using, including any changes thereto, and the data reported by the reseller to the primary exchange carrier as it relates to the secondary exchange carrier.

36. We have decided that we should not propose any reseller reporting requirements at this time. We will be reexamining the application of access charges to resellers in another proceeding and a Joint Board is examining usage measurement questions in a third proceeding.

37. Many of the carriers that would typically be secondary exchange carriers request that we require the primary exchange carriers to provide secondary exchange carriers with certain specified information. It does not appear necessary, however, to incorporate any such reporting requirements in our Rules. The members of the industry appear to be working together to resolve this problem. Moreover, NECA has the ability to require the necessary reports without our intervention. Accordingly, we reject the request to impose reporting requirements.

38. The Industry Group requests that we indicate that exchange carriers, at their option, are permitted to route the resellers' and OCCs' access traffic, where technologically feasible, over facilities planned, engineered, and built for toll purposes, or any other facilities determined by the exchange carrier to be appropriate. This flexibility, the Industry Group asserts, would assure efficient and cost effective network design and would not

affect the access charges billed to resellers or OCCs.

39. As noted by GTE Sprint Communications Corporation, the design of the exchange network is within the discretion of the exchange carriers. However, MCI expresses concern that the quality of the transmission or interconnection could be affected if unlimited discretion is granted to the exchange carriers. The relief the Industry Group is seeking with its request is unclear. It does not, for example, identify any access charge rule that it would like to see altered or waived. We see no reason to take any particular action with respect to this request based on the Industry Group petition and the present record. We simply note, however, that we would be concerned if the exchange carriers exercised their discretion in network design in a manner that degraded the transmission quality or resulted in higher access charges.

IV. Supplemental Comments

40. In the preceding sections we have clarified our decision in the *First Reconsideration Order* concerning the application of access charges in EAS situations. We believe that this should be sufficient, without any rule changes, to permit the exchange carriers to develop and apply access tariffs to interstate access services. Moreover, the exchange carriers appear to be working cooperatively in resolving many of the problems. In another proceeding, we will be considering the changes that are necessary to the access charge rules in light of the Joint Board's recommendation that cost of WATS access lines be directly assigned. Moreover, the clarification provided in this *Order* and the proceeding on the direct assignment of WATs, when taken together, adequately address the issues presented in the OPASTCO and Industry group petitions.

41. However, it is possible that some parties may believe that issues remain that require amending the rules, and we are hereby inviting supplemental comment on any such issues. Any party requesting a rule change should identify the rule and shall indicate what changes are necessary to accomplish the party's objective. Comments shall be filed within thirty days of the release of this *Order*. Replies shall be filed within fifteen days of the date on which comments are due.

V. Ordering Clauses

42. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and (j) and 201-205 of the Communications Act of 1934, as

amended, 47 U.S.C. § 154(i) and (j) and 201–205, That the Petition for Declaratory Ruling filed by the Organization for the Protection and Advancement of Small Telephone Companies IS GRANTED TO THE EXTENT INDICATED HEREIN.

43. IT IS FURTHER ORDERED, That the motion for acceptance of late-filed comments of the United States Telephone Association, the National Telephone Cooperative Association, and the Organization for the Protection and Advancement of Small Telephone Companies IS GRANTED.

44. IT IS FURTHER ORDERED, That interested persons may file supplemental comments within thirty (30) days of the release of this *Order* on what rule amendments may still be required. Reply comments may be filed within fifteen (15) days of the date on which comments are due.

45. IT IS FURTHER ORDERED, That the United States Telephone Association IS DIRECTED TO FILE MONTHLY REPORTS WITH THE CHIEF OF THE COMMON CARRIER BUREAU ON THE PROGRESS OF THE INDUSTRY NEGOTIATIONS.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Ownership

Newapaper/broadcast cross-ownership rules found not to apply to prevent common ownership of a broadcast station and a national newspaper.

— *Gannett Co., Inc.*

FCC 86-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Gannett Co., Inc. c/o Pierson, Ball & Dowd 1200 18th Street, N.W. Washington, D.C. 20036	
The Evening News Association c/o Skadden, Arps, Slate, Meagher & Flom 919 18th Street, N.W. Washington, D.C. 20006	IN REPLY REFER TO: 8940-AEA
For Consent to the transfer of control of ENA and its b/c licenses to Gannett Co., Inc.	
and	
Knight-Ridder Broadcasting, Inc. c/o Wilmer, Cutler & Pickering 1666 K Street, N.W. Washington, D.C. 20006	

Applications to assign licenses of certain b/c stations controlled by ENA to Knight-Ridder Broadcasting, Inc.

Adopted: January 13, 1986; Released: January 14, 1986

In re: Applications to Transfer Control of the Evening News Association to Gannett Co., Inc. File Nos. BTCCT-850918KF-KM BTCTTV-850918KN

Applications to Assign the Licenses of KTVY(TV), Oklahoma City, Oklahoma, WALA-TV, Mobile, Alabama, and KOLD-TV, Tucson and K07DA, Casa Adobes, Arizona, from the Evening News Association to Knight-Ridder Broadcasting, Inc. File Nos. BALCT-851127KE, KI and KO BALTTV-851127KP

Gentlemen:

This is with reference to the above-captioned applications for consent to the transfer of control of the Evening News Association (ENA) to Gannett Co., Inc. (Gannett). Also under consideration are the applications to assign the licenses of certain broadcast stations presently controlled by ENA to Knight-Ridder Broadcasting, Inc. (Knight-Ridder).[1]

By these applications, ENA and Gannett seek to effectuate an agreement and plan of merger between them which has been approved by the ENA shareholders. Each share of ENA common stock issued and outstanding will be converted into the right to receive cash, with each share issued and held in the ENA treasury to be cancelled. As a result of the proposed transaction, ENA will be merged with a wholly owned subsidiary of Gannett, with the surviving corporation retaining the ENA name.

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[1] The agreement between the parties contemplates the transfer of control of ENA and its broadcast licenses to Gannett as part of this transaction, followed by the concurrent consummation (i.e., an immediate "pass through") of certain stations, noted *infra*, for which applications seeking Commission consent have been filed.

As contemplated by this transaction, Gannett will acquire control of WDVM-TV, Washington, D.C. and KVUE-TV, Austin, Texas. Gannett, directly or through subsidiaries, controls the following broadcast licenses: KUSA-TV, Denver, Colorado; WUSA(TV), Minneapolis, Minnesota; KPNX-TV, Phoenix-Mesa, Arizona; KOCO-TV, Oklahoma City, Oklahoma; WLVI-TV, Cambridge, Massachusetts; WXIA-TV, Atlanta Georgia; WGCI(AM) and WGCI-FM, Chicago, Illinois; WCZY(AM) and WCZY-FM, Detroit, Michigan; KIIS(AM) and KIIS-FM, Los Angeles, California; KSDO(AM) and KSDO-FM, San Diego, California; KUSA(AM) and KSD-FM, St. Louis, Missouri; WDAE(AM) and WIQI(FM), Tampa, Florida; and KKBQ(AM), Houston, KTKS(FM), Denton and KKBQ-FM, Pasadena, Texas.

In order to bring Gannett into compliance with the multiple ownership rules and policies, it will assign to Knight-Ridder the licenses of ENA stations KTVY(TV), Oklahoma City, Oklahoma; WALA-TV, Mobile, Alabama; and KOLD-TV, Tucson and K07DA, Casa Adobes, Arizona. Moreover, applications were filed to assign ENA's remaining broadcast properties, WWJ(AM) and WJOI(FM), Detroit, Michigan, to Federal Enterprises, Inc. (Public Notice Report No. 13548, released January 9, 1986.)[2]

Finally, Gannett notes that its nationally distributed newspaper, *USA Today* is headquartered in Arlington, Virignia, which is within the Grade A signal contour of WDVM-TV, Washington, D.C. Because *USA Today* deals with national rather than local issues, Gannett asserts that the location of its headquarters is a completely neutral factor in terms of the local diversity concerns which underlie the Commission's newspaper/broadcast cross-ownership rules, 47 U.S.C. § 73.3555(c). Moreover, it observes that when Congress enacted the Cable Franchise Policy and Communications Act of 1934, it stated that prohibitions on newspaper/cable cross-ownership are "not intended to apply to a national newspaper (e.g., *USA Today* and the *Wall Street Journal*) that does not primarily serve a particular metropolitan area." H.R. Rep. 98-934, 98th Cong., 2d Sess. 56 (1984). Thus, Gannett believes, and we agree, that the newspaper/broadcast cross-ownership rule are not designed to affect an owner of a national newspaper and, in this case, a waiver of such rules is unnecessary.

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[2] Because Gannett presently controls the licenses of WCZY(AM) and WCZY-FM, Detroit, Michigan, the grant of the transfer application will also be conditioned upon the concurrent divestitures of ENA's Detroit radio interests. Additionally, Gannett will acquire *The Detroit News* from ENA as part of this transaction. Gannett has acknowledged, and stated its intent to comply with, the requirement to dispose of its interests in WCZY(AM) and WCZY-FM prior to October 1, 1989, when those stations' licenses are scheduled to expire. *See Multiple Ownership (Newspaper/Broadcast Combinations),* 50 FCC2d 1046, 1076, n. 25 (1975).

In view of the foregoing, we conclude that the parties are qualified to operate as represented, and that a grant of these applications as described will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the above-captioned applications seeking consent to the transfer of control of the Evening News Association ARE GRANTED subject to the condition that ENA's broadcast interests in Oklahoma City, Oklahoma; Mobile, Alabama; Tucson and Casa Adobes, Arizona; and Detroit, Michigan, be divested concurrently with the consummation of this transaction.

IT IS FURTHER ORDERED, That the grant of the transfer applications is subject to the further condition that Gannett divest itself of its interests in WCZY(AM) and WCZY-FM, Detroit, Michigan, prior to October 1, 1989.

IT IS FURTHER ORDERED, That the above-captioned applications to assign the licenses of KTVY(TV), Oklahoma City, Oklahoma; WALA-TV, Mobile, Alabama; and KOLD-TV, Tucson, and K07DA, Casa Adobes, Arizona; to Knight-Ridder Broadcasting, Inc. ARE GRANTED.

BY DIRECTION OF THE COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Application, Dismissal of

Review Board affirmed ALJ's interlocutory ruling which dismissed an application with prejudice. ALJ should have awaited responsive pleadings and considered special circumstances.

— *Horizon Community B/cers, Ltd.*
MM Docket 84-1031

FCC 85R-100

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

HORIZON COMMUNITY BROADCASTERS, LTD.	MM DOCKET NO. 84-1031 File No. BPCT-840710KG
INTER AMERICAN BROADCASTING COMPANY	MM DOCKET NO. 84-1032 File No. BPCT-840711KE
VICTORY MEDIA, INC.	MM DOCKET NO. 84-1033 File No. BPCT-840711KF
JOHNSON BROADCASTING, INC.	MM DOCKET NO. 84-1034 File No. BPCT-840711KI
LOUISE BRUNSON	MM DOCKET NO. 84-1035 File No. BPCT-840711KO

For Construction Permit for New
Television Station
Katy, Texas

MEMORANDUM OPINION AND ORDER

Adopted: December 11, 1985; Released: December 17, 1985

BY THE REVIEW BOARD:

1. This is an appeal from an Administrative Law Judge's Order, FCC 85M-3826, released October 2, 1985, dismissing with prejudice the application of Louise Brunson, because her proposed findings of fact were filed some six days late. In essence, the Review Board will reverse the dismissal order which granted a motion to dismiss without awaiting a responsive pleading by Brunson and considering her special circumstances. See paras. 8-9 below.

2. *Background*: The dismissal order indicates that four of the five applicants in this case filed their proposed findings on the due date September 17, 1985. Brunson did not file her findings until September 23rd, did not accompany them with a petition to accept late filing, nor did she at that time show any good cause for the late filing.

3. On September 23, Victory Media, Inc. filed a motion to dismiss. Subsequently, on September 26, Johnson Broadcasting, Inc., another of the competing applicants, moved to dismiss Brunson's application because the failure to comply with the ALJ's order that findings be filed by September 17 "is severely disruptive of this proceeding and has operated to greatly prejudice all other parties" and "constitutes a waiver of Brunson's right to participate further in this proceeding." Johnson also requested *expedited consideration* of its motion because of the short time remaining before the parties had to prepare their reply findings then due October 1, 1985.

4. On September 30, without awaiting the filing of a responsive pleading, the ALJ granted Johnson's motion to dismiss. The Order recited that by virtue of the late filed findings Brunson had "an unfair opportunity to review the timely [findings] of the other four parties." Brunson would have a full opportunity to review the other parties' findings before filing reply findings, but they

would not have a similar opportunity, and therefore "Brunson's activities are severly disruptive of this proceeding and . . . greatly prejudice all the other parties." In essence, the dismissal Order held that Brunson's activities constituted a waiver of her right to particiapte further in the proceeding, placing reliance upon *James E. Reese*, 45 FCC 2d 315, 320-21 (Rev. Bd. 1974), *review denied*, FCC 74-634, released June 19, 1974 (proposed findings ten days late); *Wolverine Radio Co., Inc.*, 49 FCC 2d 1038, 1039 (Rev. Bd., 1974); and Section 1.263(c) of the Rules which provides that the failure to file proposed findings, when directed to do so may be deemed a waiver of the right to participate further in the proceeding.

5. Brunson's appeal argues that the ALJ erred in granting the motion to dismiss without first awaiting her responsive pleading as required by Section 1.298(a) which provides:

> Unless it is found that irreparable injury would thereby be caused to one of the parties, or that the public interest requires otherwise, or unless all parties have consented to the contrary, consideration of interlocutory requests will be withheld until the time for filing oppositions (and replies, if replies are allowed) has expired.

While the ALJ indicated that the other parties would be prejudice by a further delay since the reply findings were due October 1, Brunson argues that the date could have been and was subsequently extended. Brunson also urges that the public interest is not served in this case by the "drastic" remedy of dismissal as the Court indicated in *Radio Athens* v. *FCC*, 401 F2d 398 (D.C. Cir. 1968), especially when the short four working days delay was the result of "unforseen and unforseeable error." App. pp. 2-3.

6. Brunson offers the following explanation for the delay:

> On the date of filing, [Tuesday, September 17] while counsel was participating in a hearing proceeding and counsel's staff was causing the printing of the findings on a new word processing system, improper operation of the system caused the erasure of entire diskette on which the findings were stored . . . total reconstruction from handwritten notes was required, a task which counsel alone could perform. During the remainder of the week, counsel both participated in a continuing proceeding concluded on Friday, September 20. After working on the weekend, counsel had the findings prepared for Monday filing. [September 23].

Brunson's counsel also represented that: "Prior to the filing of the Brunson findings neither counsel nor any of the staff of counsel read any of the other findings filed in the proceeding." App. pp. 3-4. Counsel was preparing a motion to accept late filed findings when he received the motion to dismiss. "That motion to accept was being modified to serve as the opposition to the motion to dismiss . . . when the presiding Judge's precipitous order granting the motion to dismiss was entered." App. p. 5.

7. *Discussion*: This Board has affirmed several orders dismissing applications where its review of the record established that "the ALJ had ample reason, in the light of the applicant's cumulative record, to conclude that the applicant lacked a serious intent to prosecute its application . . . " *Hillebrand Broadcasting, Inc.*, FCC 85R-94, released November 20, 1985 at p. 1; *Vela Broadcasting Co.*, FCC 85R-93, released November 15, 1985; and *Filmway of Wisconsin*, 54 RR 2d 913 (Rev. Bd. 1983). In all of these cases the Board noted that among the factors which the ALJ could reasonably rely upon was the failure to respond to motions to dismiss the applications. Here by contrast the ALJ did not await a responsive pleading which would have contained an explanation for the late filed findings. Potential prejudice to the other parties could have been avoided by granting a short extension of time of the date for filing reply findings, which was subsequently done for a different reason.

8. We hold that given the circumstances set out above, paras. 5-6, we cannot affirm the conclusion that Brunson "waived" her right to further participate in this proceeding. That conclusion was based solely on the fact that her findings were filed six days late. In *Wolverine*, *supra*, the applicant had failed to file any proposed findings of fact and had instead filed a document which "reargued a question of law which the Judge had already decided. In these circumstances, the Board must agree with the Judge that the pleading filed . . . does not constitute proposed findings of fact . . . " 49 FCC 2d 1039. Significantly, in *Reese*, *supra*, the Board indicated that "Section 1.263(c) contemplates that failure to file proposed findings of fact and conclusions, when directed to do so, within the specified period will *not necessarily be deemed a waiver* where special circumstances have been shown to exist." (Emphasis added) 45 FCC 2d at 321. There no special circumstances had been shown. Nevertheless, the ALJ did not summarily dismiss the application; instead he used the tardiness in filing the proposed findings as the "final basis" for denying the application in his Initial Decision. *See also Lyman S. Cox, Jr.*, 92 FCC 2d 1962, 1265-66 (Rev. Bd.) *rev. dismissed* FCC 83-319, released July 7, 1983.

9. Here the motion to dismiss should not have been granted without awaiting a responsive pleading which would have afforded the applicant an opportunity to demonstrate special circumstances

before her application was summarily dismissed. We have affirmed the dismissal of a great number of applications over the last three years, (*e.g.*, para. 8 above and companion case *Cuban-American, Limited*, FCC 85R-99), but have cautioned that the Commission's procedural rules "are not to be wielded with Draconian, mechanical, or insensitive finality. Waiver or modification should be considered for unusual or very special circumstances." *Pan American Broadcasting Co.*, 89 FCC 2d 167, 170 (Rev. Bd. 1982). Our words of caution are reinforced by the Court's holding in *Radio Athens* v. FCC, *supra*, and *Butler* v. *Pearson*, 636 F. 2d 526 (D.C. Cir. 1980) (dismissed case ordered reinstated where the dismissal occured eight days prior to the date on which responses were due).

10. ACCORDINGLY, IT IS ORDERED, That the Appeal of Louise Brunson, filed October 11, 1985, IS GRANTED, and that her application (MM Docket No. 84-1035) IS REINSTATED; and IT IS FURTHER ORDERED that the Motion to Strike filed October 17, 1985 by Johnson Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Delay Improper
Issue, Enlargement of, Denied
Reconsideration, Petition for, Denial of

Review Board denied enlargement and reconsideration petition of party-intervenor objecting to television grant in *Decision*, 58 RR 1068. Petition was untimely and failed to show that park official-affiant *personally* told applicant — rather than site lessee/tower owner — that its proposed transmitter site was unavailable. Delay caused by petition was unjustified to point of egregiousness.
— *Ithaca TV Associates*
MM Docket 83-475

FCC 85R-102

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Craig Fox, P. Rydell, *et al.*, d/b/a ITHACA TV ASSOCIATES Ithaca, New York For Construction Permit	MM Docket No. 83-475 File No. BPCT-820510KZ

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1985; Released: December 23, 1985

BY THE REVIEW BOARD:

1. The Board has before it a pleading styled Second Petition To Enlarge Issues and For Reconsideration ("Second Petition") filed on October 15, 1985 by L. Richard Stumbar; it also has responsive pleadings filed thereafter by Ithaca TV Associates ("Ithaca TV" or "Ithaca") and by Stumbar. Stumbar's Second

Petition will be denied for the reasons which follow.

2. Over the objections of party-intervenor Stumbar, the Board adopted a decision granting the construction permit application of Ithaca TV for a new commercial television station. *Decision*, 58 RR 2d 1068 (Rev. Bd. 1985). In that decision, we denied a prior petition to reopen the record, therein explaining our reasons. Dissatisfied, Stumbar sought reconsideration of our decision, which reconsideration we denied because Stumbar failed to raise any new matter and merely reargued points rejected by both the ALJ and the Board. *See Order*, FCC 85R-76, released September 13, 1985. In an exhibition of viscidity nearly unrivaled since Leonidas at the pass of thermopylae, Stumbar again seeks to bar the path to broadcasting to its adversary. *Modo liceat vivere, est spes*. But, Stumbar's efforts are scarcely heroic — nor are they legally sufficient.

3. It bears explaining that, throughout the previous clashes, Stumbar annihilation of Ithaca TV on grounds of alleged misrepresentation on the part of Ithaca principal Craig Fox regarding Ithaca's originally proposed antenna site on Connecticut Hill, a site situated within New York's Finger Lakes State Park. *See Decision, supra*, 58 RR 2d at 1070-1073. In short, Ithaca TV asserts that it was assured of the site by George Kimble of radio station WQNY-FM, which currently owns broadcast towers on Connecticut Hill. Stumbar contends that Kimble was advised in December, 1982 by one Andrew R. Mazzella, Regional Manager of the Finger Lakes State Park Recreation and Historic Preservation Region (a New York State authority), that not only would he oppose a new 300′ tower on Connecticut Hill, he would also object to Ithaca's mounting its TV antenna on the shorter, existing broadcast tower of WQNY-FM.[1] The burden of Stumbar's case

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[1] Far be it from us to second-guess the aesthetic judgments of a sensitive New York State parksman, but we are a little puzzled by Mr. Mazzella's apparent position. Although there may be a marginal visual impact arising from the construction of another tower on a site already hosting broadcast towers, we - perhaps as environmental philistines — fail to see much impact arising out of the placement of a rapier-like antenna on an *existing* 157′ broadcast tower. We naturally accept the Shakespearian notion of "sans taste, sans everything." Still, we assume that the administrative judgment of state authorities may not be capricious. In that regard, we are disquieted by the statement of the Regional Representative of the Secretary of State of New York, Edward J. Conley, appended to the Second Petition as Exh. 2. Therein, Mr. Conley avers that, upon receiving a call from the General Manager of WQNY-FM (Jim Roberts) to discuss a long-term lease on the Connecticut Hill site, Mr. Conley passed a dark hint:

> I mentioned that if I were him, I would drop the matter of the long term because, of [sic] the state looked at the matter more closely, Mr. Roberts'

against Ithaca TV is, thus: if George Kimble knew of Mazzella's dudgeon, Craig Fox must be *presumed* to have had knowledge thereof almost immediately, thus disqualifying Ithaca of the right to amend its application to a new site and, also, disqualifying Ithaca on candor grounds for failure to advise the Commission more promptly of the Connecticut Hill situation.[2]

3. Under the guise (or, more properly in this case, gauze) of "newly discovered evidence," Stumbar again charges up Connecticut Hill, this time with yet another statement from the helpful Mr. Mazzella recounting, again, his 1982 discussions with WQNY-FM's George Kimble. Even without refighting the battle of Connecticut Hill, Stumbar's petition fails easily on procedural grounds, since (a) it is hardly evidence that could not have been timely discovered, 47 CFR § 1.229(b); *Durfee's TV Cable Co.*, 11 FCC 2d 979 (1968); and, (b) it is hardly "evidence" at all. In fact, not only does Mr. Mazzella's September 6, 1985 affidavit indicate that he never advised either Craig Fox or Ithaca TV of his developing position on Connecticut Hill, *see* Second Petition at Exh. 1, Stumbar's own Replycontains an even later affidavit of Mr. Mazzella in which the parksman unequivocally declares[3]:

> I do not, of course, know what Mr. Kimble told Craig Fox.

4. "Of course," indeed! Issues may be added in Commission cases upon affidavit of persons who have knowledge of pertinent facts raising significant and material questions. *See* 47 CFR § 1.229(d). Even were Stumbar's "evidence" timely — and not approximately three years after-the-fact — we neither could nor would reopen a settled proceeding based upon a firm attestation of *personal ignorance*.[4] Mr. Mazzella's statements, insofar as they are directly relevant, amount to less than hearsay. Stumbar's

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> company might end up with fewer privileges than it currently has. I also told him I would not write the matter up as an official ombudsman case and we left it at that.

Exh. 2, at 2.

[2] Ithaca was reprimanded for the tardiness in this respect, 58 RR 2d at 1072. But — the circumstances considered, including ongoing settlement negotiations which would eventually terminate the *competitive* proceedings — we found Ithaca's lateness not to be disqualifying. *Compare Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *aff'd mem. sub nom. Royce International Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Cir. filed April 30, 1985).

[3] Stumbar Reply Exh. 1, at 3 (Mazzella affidavit of October 22, 1985).

[4] In fact, to the extent that the record or the pleadings reflect *any* communication between Mr. Mazzella and Ithaca TV, they advert to only a letter of June 15, 1983 from Craig Fox to Mr. Mazzella asking to discuss the Connecticut Hill site. It is alleged that Mr. Mazzella never even responded to Mr. Fox. Ithaca TV Opposition, at 7.

arguments have all been considered and reconsidered, and we find that the delay caused by Stumbar's latest paper phantoms are unjustified to the point of egregiousness. *Cf. Neil I. Sanders*, FCC 85R-87, released October 29, 1985.

5. ACCORDINGLY, IT IS ORDERED, that the Second Petition to Enlarge Issues and for Reconsideration filed October 15, 1985 by L. Richard Stumbar IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Control, Transfer of, Authorized
Control, Transfer of, Procedures
Special Temporary Authorization

STA granted to independent trustee to solicit, acquire and purchase shares as the first step in a tender offer to acquire control of a licensee: Section 309(f) applicable as tender offers are extraordinary within the meaning of the statue: long-form review to be made if the tender offer is successful.

— *L. P. Media, Inc.*

FCC 85-477

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Applications of:	
L. P. Media, Inc.	File Nos. BTCCT-850729KM BTC-850729KN BTCH-850729KO BTCCT-850729KE - KS BTCTTV-850729KT
and	
G. William Miller, Trustee	File Nos. BTCCT-8507290KE BTC-850729KF BTCH-850729KG BTCCT-850729KH - KK BTCTTV-850729KL
For Commission Consent to a Transfer of Control of the Evening News Association	

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 1985; Released: August 27, 1985

BY THE COMMISSION: COMMISSIONERS FOWLER, CHAIRMAN; AND RIVERA NOT PARTICIPATING; COMMISSIONER QUELLO DISSENTING AND ISSUING A STATEMENT.

1. We now consider: (1) the applications set out in the caption seeking our consent to a transfer of control of the Evening News Association (the Evening News); (2) an "Objection to and Petition to Dismiss Miller Application," filed August 5, 1985, by the Telecommunications Research and Action Center, Henry Geller and Donna Lampert (TRAC); (3) an "Objection to Application and Petition to Dismiss," filed August 6, 1985, as supplemented August 7, 1985, by the Evening News; (4) and "Opposition of L.P. Media, Inc." (L. P. Media), filed August 9, 1985; (5) a "Response of Voting Trustee," filed August 9, 1985, by Mr. G. William Miller, as voting trustee (the Trustee); and (6) a "Reply" filed by the Evening News on August 12, 1985. Petitioners TRAC and the Evening News may be subsequently referred to jointly as "petitioners."

Background

2. The Evening News is the licensee directly or through subsidiaries of stations: WDVM-TV (channel 9, CBS), Washington, D.C.; WALA-TV (channel 10, NBC), Mobile, Alabama; KOLD-TV (channel 13, CBS), Tucson, Arizona; KVUE-TV (channel 24, ABC), Austin, Texas; KTVY(TV) (channel 4, NBC), Oklahoma City, Oklahoma; WWJ(AM) and WJOI(FM), Detroit, Michigan; low power television station K07DA, Casa Adobes, Arizona; and related broadcast auxiliary stations.

3. The Evening News is owned by about 333 shareholders, approximately half of whom are Michigan residents. The corporation's shares are not required to be registered with the Securities and Exchange Commission. L. P. Media and its wholly owned subsidiary, L. P. Acquisition Corporation, were formed by Messrs. Norman Lear and A. Jerrold Perenchio for the purpose of acquiring the Evening News. The applicant proposes a $1,250-per-share tender offer, which, as L. P. Media advises, is not subject to federal securities laws governing tender offers. L. P. Media states, however, that it has voluntarily complied with federal securities requirements. Consistent with those federal requirements, L.P. Media's tender offer would remain open for 20 days. *See* 17 C.F.R.

§ 240.14e-1a (1984). Michigan law, in contrast, requires tender offers to remain open for at least 60 days. L. P. Media sought to enjoin the applicability of that and other provisions of the Michigan corporation laws as unconstitutional under the commerce clause of the United States Constitution. On August 7, 1985, Judge Robert E. DeMascio of the United States District Court for the Eastern District of Michigan refused to enjoin the applicability of the Michigan laws to the L. P. Media tender offer, insofar as those laws pertain to the Evening News' Michigan shareholders. L. P. media states that it filed an immediate appeal from this adverse ruling. Without regard to the outcome of that appeal, we perceive the need for prompt action on L. P. Media's application. Our action here does not transfer control of the Evening News. It only permits L. P. Media to proceed with its tender offer with the prior Commission approval required by the Communications Act. For reasons set out below, we believe that the Commission's processes should not be used to deny an opportunity for the consideration of L. P. Media's offer by the Evening News shareholders. We shall assume for the purposes of this ruling, therefore, that L. P. Media will be able to proceed with its tender offer.

Discussion

4. Except as noted below, the transaction proposed here is identical in all relevant respects to the transaction we considered and approved in *One Two Corporation and Eugene McCarthy* (*McCarthy*), 58 R.R.2d 924 1985. That is, L. P. Media has submitted one application seeking our consent to permit the Trustee to collect the shares tendered and, subject to specified limitations, vote the shares and take other actions consistent with the voting trust agreement. If the tender offer is successful, we would consider the second application, which proposes the transfer of the shares from the trustee to L. P. Media. We have already put that application out on public notice to allow for full, long-form review, including public participation, of the ultimate buyer's qualifications. The voting trust in this case is patterned on the trust agreement approved, subject to additional Commission-imposed conditions, in *McCarthy*. Briefly, the Trustee has the authority to elect two members of the nine-member Board of Directors of the Evening News. The Trustee and anyone he might elect have no, and will not have any, familial or business relationships with L. P. Media, related companies and their

principals. L. P. Media and no one connected with it will be involved directly or indirectly in the operation or management of the Evening News while the trusteeship is in place, nor will there be any effort by them to seek to influence the operation of management of the corporation. L. P. Media owns no Evening News shares in its own name. Communications between the trustee and L. P. Media will be limited to the specified subjects and will be in writing; in other words, it is restricted in the same manner as set out in *McCarthy*. The Trustee is obligated to vote for the transfer of shares from him to L. P. Media, if approved by the Commission, and to vote against actions that would be inconsistent with the tender offer or which waste the assets of the Evening News. "In all other respects, [the Trustee] shall vote the Acquired Stock so as to maintain the 'status quo' and to maintain the present management and operations" of the Evening News, under the terms of section 5(c) of the trust. In the event that the ultimate transfer to L. P. Media is not approved, the Trustee is obligated to dispose of the stock acquired so as to maximize the proceeds to L. P. Media.

5. The Trustee, Mr. G. William Miller, is the former Secretary of the Treasury and former Chairman of the Federal Reserve Board. He is a United States citizen. He has certified that he has violated no laws, nor is he involved in any proceedings concerning laws about which we are interested. Relying on the resources of L. P. Media, he also has certified that he is financially qualified. Finally, he has certified that he has no attributable interests in any other broadcast, newspaper or cable television entity.

6. The petitioners have raised no challenge to the personal qualifications of the Trustee. Similarly, they have not challenged the terms of the trust agreement or the degree of insulation between the Trustee and L. P. Media during the trusteeship. However, the petitioners challenge our statutory authority to use the two-step, trustee procedure.

7. In both *McCarthy* and *Committee for Full Value of Storer Communications Inc.*, 57 R.R.2d 1651, *aff'd*, *Storer Communications, Inc. v. F.C.C.*, 58 R.R.2d 244 (D.C. Cir. 1985), (per curiam), we expressed our view that in contests for control of corporate licensees we ought not permit our processes to be used to aid challengers or to protect existing management, to the extent that we could avoid those results consistent with the requirements of sections 309 and 310 of the Communications Act of 1934, as amended, 47 U.S.C.A. §§ 309 and 310 (West Supp. 1985). The basis for that position was set out fully in those decisions and

need not be repeated here. We shall review the proceeding now before us from the same position.

8. In *McCarthy*, we concluded that we could grant the temporary transfer of a controlling stock interest in a licensee corporation to a trustee based on two different approaches. The first approach was that the transfer to the trustee did not involve a "substantial change of ownership or control" within the meaning of section 309(c)(2)(B) of the Act. The second approach was to issue a special temporary authorization (STA) to the Trustee under section 309(f) of the Act. Because the legal and policy bases for these approaches have been articulated in *McCarthy*, we shall not repeat that analysis here. Although we concluded that we could grant the Trustee an authorization under either approach, we chose the more conservative route and granted a limited STA under section 309(f). The petitioners assert that we erred as to both approaches. Because we propose to proceed under 309(f), however, we shall not address those portions of the petitioners' pleading as to section 309(c)(2)(B) of the Act. In any event, we have considered the arguments made, and we are not persuaded that our analysis of the 309(c)(2)(B) question was in error. Thus, we conclude that we could proceed under 309(c)(2)(B) in this case. However, for the same reasons as set forth in *McCarthy*, we opt to proceed under section 309(f).

9. The petitioners assert that the use of section 309(f) as a basis for a STA in *McCarthy* was in error and should not be repeated here.[1] They first focus on the use of the word "operation" in the statute. They take the position that "operation" is used in the sense of transmitting a signal, not in the sense of operation under a trustee in the context of a transfer application. We reject that interpretation. There is no indication in the statute or its legislative history to suggest such a narrow definition. The purpose of the section was to enable the Commission to avoid the statute's 30-day waiting period in appropriate circumstances, and we have no basis for believing this purpose does not apply to the

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[1] Section 309(f) provides in part:

> When an application subject to subsection (b) has been filed, the Commission notwithstanding the requirements of such subseciion, may, if the grant of the application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operation would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days, and upon making like findings may extend such temporary authorizations for additional periods not to exceed 180 days.

30-day period for transfer applications. In addition, prior to the 1982 amendments to the Communications Act,[2] the Commission had used section 309(f) as a basis for issuing an STA in the transfer context, although on different facts than are now before us. *Gale Broadcasting Co.*, 15 R.R.2d 337, *recon. denied*, 19 F.C.C.2d 623 (1969). Congress had an opportunity to correct that interpretation of the statute in 1982, but did not do so. Finally, we can grant STA's for nonbroadcast operation under section 309(c)(2)(G) of the Act.[3] We have granted STA's under that section for "operation" by a transferee or assignee. *See, e.g., Telesis Corporation*, 68 F.C.C.2d 696 (1978). That case, which also preceded the 1982 amendments to the Act, involved CARS facilities that fall under section 309(b)(2)(A) as "fixed point-to-point microwave stations." As such, transfer and assignment applications involving CARS stations, like broadcast stations, are subject to the 30-day waiting period specified by section 309(b) and petitions to deny under section 309(d), unless exempt as "insubstantial" changes under section 309(c)(2)(B). Although recognizing that broadcast and nonbroadcast stations may be treated differently for many purposes, we see no persuasive reason why the definition of "operation" should be different for nonbroadcast stations under section 309(c)(2)(G) than for broadcast stations under section 309(f). Thus, prior to the 1982 amendments, we found that "operation" included the operations of a station by a transferee, and the 1982 amendments do not indicate that the usage was improper.

10. TRAC urges that section 309(f) is meant to be used only for equipment failures and other cases where operation at variance with licensed parameters is needed to continue service. TRAC also seeks support from section 73.3542(b), which pertains expressly to applications for STA's in emergency situations. It is of course true that STA's usually are granted for the kinds of events described by TRAC. Nevertheless, section 73.3542(a) and section 309(f) are couched in terms of "temporary" operations, not "emergencies," and the definition of an STA set out in section 73.1635 of the Rules is not restricted to "emergencies."[4] We

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[2] Pub. L. No. 97-259, 96 Stat. 1087, 1094 (1982).

[3] Section 309(c)(2)(G) provides for "a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed 60 days pending the filing of an application for such regular operation."

[4] Section 73.1635 of the Rules provides in part: "A special temporary authorization (STA) is the authority granted to permit the operation of a broadcast facility for a limited period at a specified variance with the terms of the station

believe that "temporary" is a broader term than "emergency," and that restricting the broader term only to emergency operations assumes that Congress when amending the statute to delete the word "emergency" in section 309(f) made a virtually meaningless change, an assumption we are not prepared to make. TRAC characterizes the 1982 amendments as involving only "technical" amendments, and the interpretation we have made is greater than a "technical" change in its view. We find that the amendment did grant us broader authority, but, given the prior use of the statute to permit operations by transferees, believe that such an amendment could be properly considered a technical change. In any event, H. Rep. No. 97-765, 97th Cong., 2d Sess. (1982), which is the Conference Report for the 1982 amendments to the Act, did refer to the fact that some of the statutory changes were "technical" amendments, *id.* at 60-61, but the brief section of the legislative history involving section 309(f) is not within that section describing "technical" amendments. *Id.* at 36-37. Thus, we reject TRAC's contentions.

11. The petitioners further take the position that even if *McCarthy* was correctly decided, its rationale should not be extended to this case. They assert that in *Storer* there was an imminent annual shareholders' meeting, and our failure to act would have prohibited the proxy contest. In *McCarthy*, we had previously authorized the management's proposed corporate reorganization of the license that would be voted upon by shareholders at an upcoming meeting. A delay imposed by Commission processes might have had the effect of denying the licensee's shareholders the opportunity to consider the challenger's tender offer, and that prospect was inconsistent with federal and state policies regarding shareholders consideration of tender offers. In contrast, the petitioners assert, the August 23, 1985 expiration date of the tender offer is self imposed by L. P. Media. They conclude in these circumstances, therefore, that we should not be driven by the privately set deadline and instead should follow normal long-form procedures without consideration of the interim Trustee's application.

12. We agree that we should not be driven by private deadlines, but we disagree that expeditious action is not warranted. First, L. P. Media set the August 23 deadline based on the time frames used in federal securities regulation. We recognize that this case involves securities not subject to those laws, but in making our

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authorization or requirements of the FCC rules applicable to the particular class of station."

own public interest judgments as to the questions presented here, the congressional and S.E.C. policy judgments are very helpful. For our purposes, we shall look to those sources, rather than the State, for guidance. More important, delay in fact serves incumbent management and disserves the interests of providing shareholder options by making more difficult tender offers from outsiders. There are numerous court and congressional statements to support that conclusion, including: *Edgar v. MITE Corp.*, 457 U.S. 624, 637-38, nn. 12 and 13 (1982)[5]; *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); and H. Rep. No. 94-1373, *reprinted in* 1976 U.S. Code, Cong. & Ad. News 2562. This conclusion is true whether or not there are other specific exigencies, such as a scheduled shareholders meeting.

13. H. Rep. No. 94-1373 is particularly relevant here. It concerns the adoption of the Hart-Scott-Rodino bill. *See* 15 U.S.C.A. § 18a (West Supp. 1985). That statute applies to L. P. Media's tender offer, and the necessary approval has been received. In adopting that legislation, Congress sought to fashion procedures that would avoid delay, and referred to other securities laws on that point. At p. 2644, U.S. Code, Cong. & Ad. News, the report states:

> [C]ash tenders depend on speed and surprise. If months go by, the target company's incumbent management can often frustrate a cash tender offer, by establishing "lifetime" employment contracts for themselves, or by arranging a more favorable "defensive" merger, or by other means.
>
> That is why Congress, in 1968 and 1970, after fully considering the nature and purpose of cash tenders, passed the Williams Act, which imposes only a ten-day pre-consummation waiting period on cash tenders . . . .
>
> [I]t is clear that this short waiting period was founded on congressional concern that a longer delay might unduly favor the target firms' incumbent management, and permit them to frustrate many procompetitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act — to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chance for success.

As a result of the concerns expressed above, the statute adopted by Congress calls for expedited review of cases involving cash tender offers. *See* 18 U.S.C.A. § 18a(b)(1)(B). It is important to note that the abbreviated timetables prescribed there apply to offers for privately held corporations, as well as to corporations covered by the Williams Act. It is also important to note that Congress determined that such expedited government review is a neutral course. To the extent possible under the Communications Act, we should minimize the conflict between our procedures and other federal policies. *LaRose v. F.C.C.*, 494 F.2d 1145, 1146, n. 2 (D.C. Cir. 1974). We believe that the policy judgment made by Congress in Hart-Scott-Rodino supports our conclusion that expedition is entirely appropriate in this case.

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[5] As noted by the Supreme Court, delay can aid incumbent management giving it time to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to create an antitrust violation should the tender offer succeed; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; and (7) institute litigation challenging the tender offer. *Id.* at 638, n. 13. For specific examples of some of these actions, see the description set out in our recent decision in *Turner Broadcasting System, Inc.*, FCC 85-424, released July 30, 1985.

14. Court and S.F.C. decisions also support our conclusion. "For tactical reasons, proxy contests are often not begun until within weeks prior to a shareholder meeting. Requiring long-form review could very well result in unduly insulating incumbent directors from challenge." *Storer Communications, Inc. v. F.C.C.*, 58 R.R.2d at 248. We believe that the statement is also applicable to the tender offer in this case. Further, the S.E.C. has determined that a minimum tender offer of 30 days was unnecessarily long, and that a 20-day period, which L. P. Media has specified, is appropriate.[6] As the Supreme Court stated in the *Rondeau* case, Congress intended "to do no more than give incumbent management an opportunity to express and explain its position." 422 U.S. at 58. There is no suggestion that Congress intended to grant time to incumbents to find a "white knight" or to prepare a counter offer. Mr. Peter B. Clark, President of the Evening News, has been quoted as stating that the corporation will fight the tender offer by "whatever means necessary," and will "take whatever steps necessary to avoid being sold." *The Detroit News*, July 30, 1985. L. P. Media's concerns as to management-created roadblocks to its tender offer appear, therefore, well founded. We believe in these circumstances that the public interest is served by following the two-step procedure, approved in *McCarthy*, in this case as well. Although the Evening News asserts that this procedure favors L. P. Media in the contest for control of the

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[6] *See* 17 C.F.R. § 240.14e–1a and Exchange Act Release No. 16384, dated November 29, 1979, 1979 S.E.C. Dec. (CCH) 82, 373 (1979). TRAC asserts that we could wait for the expiration of a 30-day period, call for hand-delivery of pleadings, specify seven- and three-day periods for opposition and reply pleadings, and in five days prepare and vote on a decision. Even this very optimistic scenario contemplates a total delay of 45 days, well beyond the period indicated by the S.E.C. as being an appropriate balance of the conflicting interests involved in tender offers.

corporation, we believe our position is essentially neutral. The Commission's procedures, of course, contemplate similar expeditous processing of any other application for opposing proposals to the shareholders, including any which might come from the Evening News itself. L. P. Media will be able to make its offer to shareholders in the same time frame as would be the case if a corporation not holding FCC licenses were involved, and the Evening News will have a similar opportunity to express and explain its position to the shareholders. Insofar as the shareholders are concerned, both sides will be in the same position. It will thus be the shareholders, not the Commission, who decide whether the Company should be sold. This result, in our view, maximizes our neutrality.[7]

15. Because of L. P. Media's self-imposed deadline of August 23, the petitioners allege that there are no "extraordinary circumstances" present, which are required before section 309(f) can be invoked. We believe, however, that it is the circumstances presented by the tender offer itself that are "extraordinary," because of the need for expedition to permit shareholders to consider the tender offer. Moreover, at this point, the number of such tender offers is exceedingly low among broadcast licensees. Thus, at least at this time, and subject to further consideration in our pending *Notice of Inquiry* on proxy contests and tender offers, FCC 85-218, released August 20, 1985, we shall continue to consider such matters extraordinary on this ground as well.

16. In summary, when Congress initially adopted section 309(f) in 1960, when the statute contained the limitation as to emergencies, Congress described the new provision as "a safety valve to protect the public interest in those rare cases in which it finds that the delay required by [formal, 30-day procedures] would seriously prejudice the public interest." S. Rep. No. 690, 86th Cong., 1st Sess. 2 (1959). We believe that the use of section 309(f) in this tender offer context, particularly in light of its broadened coverage for temporary, in contrast to emergency, operations,

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[7] The Evening News fails completely when it states that our procedures in this case are not neutral because prompt action on our part may bar the filing of competing tender offers by other unidentified offerors. This is true in any tender offer, whether involving FCC licensees or not. The Evening News seems to suggest that once one tender offer is made for a corporation holding FCC licenses, which is contested by the incumbents, we should specify an "open season" to permit the filing of additional offers. Such a procedure would only afford the target company more time to take defensive measures as to all tender offers and would exacerbate the delays we seek to avoid. Of course, shareholders always have the option, and may wish, to withhold tendering their shares, if other offers have been announced or might be anticipated.

properly makes use of this safety valve in precisely the manner intended.[8]

17. L. P. Media also suggests that the issuance of an STA is also supported by sections 4(i) and 4(j) of the Act, 47 U.S.C. §§ 154(i) and 154(j). The former provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." The latter provides in part that "[t]he Commission may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice." In fact, on reconsideration in *Gale Broadcasting Co.*, 19 F.C.C.2d 623 (1969), we also relied on sections 4(i) and 4(j) of the Act. We note that we relied on section 4(i) in *McCarthy*, at paragraph 36, and believe sections 4(i) and 4(j) provide additional statutory support for the grant of an STA in this case. *See also KDAB, Inc.*, 91 F.C.C.2d 277, 284, n. 19 (1982) (Commission rejects the proposition that section 309(f) "is the sole repository for Commission authority to authorize temporary operations" when granting an STA under section 4(i)).

18. There remain other contentions that can be disposed of briefly. First, TRAC contends that the grant of the short-form application or an STA authorizing the Trustee to proceed will prejudice the outcome of consideration of the long-form application, if the tender offer is successful. The substance of this contention was raised and considered fully in *McCarthy* at paragraph 39. We reject the contention here for the same reasons set out in *McCarthy*. Second, the Evening News asserts that principals of L. P. Media have engaged in tortious acts and law violations that potentially make them unfit to hold a Commission license. L. P. Media denies any wrongdoing, but we need not decide those questions here. We shall consider those allegations in connection with the long-form application, if the tender offer succeeds, as those matters do not go to the qualifications of the Trustee, the person whose qualifications we act upon here. *See McCarthy* at paragraphs 30 and 35. Finally, the Evening News alleges that the Trustee will not be able to maintain the status quo because the changes contemplated in this proceeding will result in the resignation of large numbers of officers, directors and high-level employees. We understand that at any station

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[8] *See McCarthy* at paragraph 29 and n. 10, for a discussion of the use of a trustee in analogous situations as the temporary holder of a license until a buyer can be found and considered under formal, long-form procedures.

there is a turnover of the staff over time, and that such turnover may increase when changes occur. The fact is that those who remain behind will continue to operate the stations and hire replacements for those who leave. In any event, such departures flow from the decisions of the individuals involved, not from the Trustee. In other words, the status quo will change only if management compels the change. In *McCarthy*, we considered a similar concern involving the ability of the Trustee to maintain the status quo. We acknowledged that some changes inevitably might occur, but we noted that the status quo would not change unless in reaction to changes caused by the incumbent management itself, and that, therefore, management could prevent any such changes in the status quo. *See McCarthy* at paragraph 25. ("The Trustee will act independently only if management compels him to do so, by itself taking action inconsistent with preserving assets or effectuating the transaction.") If we were to accept the Evening News' allegation as dispositive, any target company could threaten a high rate of turnover. Thus, those most actively engaged in resisting the tender offer would control our processes so as to bar the challenge, effectively providing a shield for the incumbents. We believe our role should be neutral in such contests to the maximum extent possible: we should not be a shield. For these reasons, we do not believe that the allegation calls for a halt in the processing of the applications.

19. The Evening News suggests that the two-step process employed here means that we shall "rubber stamp" any trustee that is presented to us. In that regard, however, we note that neither petitioner has challenged the qualifications of the trustee. We have reviewed the information submitted as to his qualifications to be a licensee, and find him fully qualified.

20. As noted above, we have initiated a *Notice of Inquiry* on the subjects of proxy contests and tender offers. The Evening News' assertion that our approval of the trustee process in this case will foreclose the development of a different approach after the Inquiry is not persuasive. As stated in the Inquiry, and emphasized in *Storer* and *McCarthy*, each case coming before us prior to the *Report and Order* in the *Inquiry* will be examined on its individual merits. Therefore, nothing we do in this case is, or should be viewed as, dispositive of any other case that might come before us or foreclosing the adoption of an alternative

approach as a result of the *Inquiry*.

21. For the reasons set forth in *McCarthy* and above, we believe that a grant of an STA to the Trustee will serve the public interest, convenience and necessity. Although the applicants have acquiesced in all conditions and material representations that formed the basis for our action in *McCarthy*, we shall impose similar conditions on the grant of the STA in this case to assure no misunderstanding. Further, we rely on the representations made by the applicants.

22. Accordingly, IT IS ORDERED, That special temporary authority IS GRANTED to Mr. G. William Miller, Trustee, for 180 days from the date of release of this decision, to solicit, collect and acquire the stock of The Evening News Association, subject to the representations set out in the applications, the conditions set out in the trust instrument, except as otherwise limited by this decision or as follows:

1. Messrs. Perenchio and Lear, L. P. Media, Inc., L. P. Acquistion Corporation, or the officers and directors of those two corporations (collectively referred to below as the L. P. Media Interests) will not nominate a member of the Board as their representative, or influence the Trustee's selection of Directors. Any persons nominated by the Trustee for the Board of Directors of The Evening News Association (the corporation) and elected shall be subject to the same restrictions and conditions applicable to the Trustee, and shall have no familial or business relationships with the L. P. Media Interests.

2. The L. P. Media Interests will not involve themselves, directly or indirectly, in the operation or management of the corporation, or seek to influence the operation or management of the corporation.

3. Any communications from the Trustee to the L. P. Media Interests concerning the tender and purchase of shares from the present stockholders or on the maintenance of management and operations of corporation shall be in writing. No communication shall be made by the L. P. Media Interests to the trustee, orally or in writing, regarding the operation or management of the corporation. Communications from the L. P. Media Interests to the Trustee as to the tender and purchase of shares must be in writing.

4. The Trustee will maintain the status quo. This requires that the Trustee act so as to maintain the present management and operations of the corporation. The Trustee shall have discretion to oppose only actions inconsistent with the preservation of corporate assets or actions that would be inconsistent with the transfer of control to the L. P. Media Interests, if approved.

5. There will be no substantial changes in the trust instrument except as may be necessary to comply with this order. Any insubstantial changes in

that instrument shall be filed promptly (within ten days of the date of execution) with the Commission, with a copy to the Chief, Video Services Division.

6. In the event that the application to transfer control to L. P. Media, Inc., is not approved, the Trustee will notify the Commission promptly (within 30 days after a final determination or within 30 days after L. P. Media, Inc. determines that it will no longer pursue such a transfer) as to his plans for disposing of the stock in the shortest period possible.

7. Any request for an extension of this authorization will be filed at least 30 days in advance of the expiration date.

23. IT IS FURTHER ORDERED, That the petitions filed by The Evening News Association, and by the Telecommunications Research and Action Center, Henry Geller and Donna Lampert, ARE DENIED.

24. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau shall mail copies of this decision, by certified mail, return receipt requested, to the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

August 26, 1985

Dissenting Statement
of
FCC Commissioner James H. Quello

In re: Application of L. P. Media, Inc. and G. William Miller, Trustee, for Commission consent to a tranfer of control of the Evening News Association.

My dissent to the Commission's recent decision in *One Two Corporation and Eugene McCarthy* (*McCarthy*)[1] was based upon the legal and policy concerns that flow from the majority's attempt to avoid prescribed statutory procedures by means of a trustee arrangement. Since the trustee plan adopted in this case is exactly modeled on the *McCarthy* decision, identical concerns apply here. Therefore, I refer the reader to my dissent in *McCarthy*[2] for a full discussion of my views.

To summarize my concerns very briefly, the majority's approval of the transfer of a majority of the stock of the Evening News

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[1] 58 Rad.Reg.2d (P&F) 924 (1985).
[2] *Id.* at 937 (Quello, C., dissenting).

Association to a trustee is improper because this process fails to comply with the express requirements of section 309 of the Communications Act. 47 U.S.C. § 309. This section requires that any application for the transfer of rights under a station license that involves a "substantial change in ownership or control" must be preceded by a 30-day holding period and by an opportunity for the filing of petitions to deny. *See* 47 U.S.C. §§ 309(b), 309(c)(2)(B), & 309(d)(1).

The proposed transfer to a trustee clearly would effect a "substantial" change since a majority of the shares must be transferred for the tender offer to succeed. Also, since the trust arrangement would abrogate majority shareholder control, there necessarily would be a substantial change in control. In addition, the possibility exists that a clearly substantial transfer of control to the trustee may occur without the required Commission consideration of his qualifications since the trustee is authorized to exercise control under certain circumstances.

Next, while the majority relies on section 309(f) of the Act, the Commission's authority to grant temporary authorizations for "temporary operations" under "extraordinary circumstances" to avoid "serious prejudice [to] the public interest"[3] cannot be interpreted legitimately to permit permanent changes in ownership and control when ongoing "operations" are in no jeopardy and would, at best, be unaffected by the proposed transfer.

Finally, my dissent in *McCarthy* focused on the significant risk that the ability of the licensee corporation to operate in the public interest would be adversely affected by the majority's unclear division of ultimate authority between (1) incumbent directors (and managers) who will have lost majority shareholder support and (2) a trustee who has an affirmative responsibility to exercise control when necessary to preserve corporate assets. In such a situation, the locus of ultimate control is so muddled that its exercise when required may be impossible.

While the basic elements of *McCarthy* and the present case are identical, several matters raised by the majority opinion warrant brief discussion here. First, the majority's improper determination to avoid considering the difficulties that will arise under the trustee arrangement is further evidence by the brevity of its discussion of the argument that some of the officers and directors who are expected to exercise control during the trustee's stewardship may leave the corporation after a successful hostile tender offer occurs. The majority's answer is to simply assert that "those who remain behind will operate the stations and hire replacements for those who leave." Majority Opinion at ¶ 18. The majority's sole expressed concerns are to assure adequate limitations on trustee authority and to protect Commission neutrality. *Id.* In my view, this is an abrogation of the Commission's responsibility to ensure that this ownership change is consistent with the public interest. *See* 47 U.S.C. § 310(d). While evolutionary changes in corporate officers are not generally of concern to this Commission, changes in directors and officers that directly accompany a complete transfer in majority ownership cannot be dismissed as of no consequence to this Commission's obligations under the Act. The majority relies heavily on the continuity of these directors and officers.[4] More importantly, the majority has an obligation to focus on possible disruption at the licensee corporation so that any possible harm will be minimized. Instead, the majority continues to avoid facing any of the public interest questions raised by employing this novel trustee arrangement in a hostile takeover environment.

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[3] 47 U.S.C. § 309(f).

Second, in *McCarthy* the majority relied upon the upcoming shareholders' meeting to provide the "extraordinary circumstances" expressly required to implement section 309(f).[5] In the present case, no such upcoming event necessitates action in advance of full Commission review under the statutory procedures of section 309. Since no harm has been demonstrated to occur from prompt compliance with the statutory procedures, use of section 309(f) is clearly inappropriate in this case.[6]

Finally, while the majority indicated that it expressly relies for statutory authority on sections 4(i) and 4(j) of the Act,[7] section 4(i) only authorizes actions "not inconsistent with [the] Act" and the majority's action is directly inconsistent with sections 309(b) and 309(d). Also, the general procedural discretion granted the

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[4] *See, e. g., McCarthy* at 931 (¶ 27).

[5] *See McCarthy* at 932.

[6] In addition, the majority's further analysis of Commission authority under section 309(f) provides no additional support for the legality of this action. *See* Majority Opinion at ¶¶ 9–10. The majority's reliance on *Gale Broadcasting Co.*, 15 Rad. Reg. 2d (P&F) 337, *reconsideration denied*, 19 F.C.C.2d 623 (1969), as support for use of a special temporary authorization is misplaced because in that case continued operation of the station would not have been possible without grant of the authority. The Commission expressly found that its action was "the only course to permit continued service to the public during an expedited hearing." *Gale Broadcasting*, 19 F.C.C.2d at 624. Here, on the contrary, there is no threat to continued "operations" that might permit invocation of section 309(f).

[7] 47 U.S.C. §§ 154(i) & 154(j).

Commission by section 4(j) can provide no authority for the Commission to avoid the specific procedural directions contained in sections 309(b) and 309(d). Accordingly, the majority's use of the trustee procedure gains no support from these provisions.

For the reasons discussed above and in my dissent to the *McCarthy* decision, I dissent.

Application, Amendment of, Engineering Charge
Ownership and Management, Integration of
Partnerships

Review Board affirmed TV grant, crediting the limited partnership arrangement of one applicant and awarding full integration credit based on the participation of the general partners, while discounting the integration proposal of a second limited partnership. The activities of all partners in the winning applicant were consistent with a valid limited partnership, while the purported limited partner of the loser was active in virtually all aspects of the partnership. ALJ's acceptance of engineering amendment to cure short-spacing problem first raised in designation order also affirmed.
— *Louisiana Super Comm. Ltd. Partnership*
MM Docket No. 84-43

FCC 85R-101

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Kay Burns Crochet and Samuel R. Levatino d/b/a LOUISIANA SUPER COMMUNICATIONS LIMITED PARTNERSHIP, Baton Rouge, Louisiana	MM DOCKET NO. 84-43 File No. BPCT-830602KK
South Louisiana Television, Inc. John S. Baker, Jr., and Charles C. Gremillion, Jr., d/b/a PARISH FAMILY TELEVISION-LIMITED PARTNERSHIP Baton Rouge, Louisiana	MM DOCKET NO. 84-44 File No. BPCT-830603KE
Brian W. Brady, Linda J. Tallman and John Clark Nims d/b/a BATON ROUGE CHANNEL 44, LIMITED PARTNERSHIP Baton Rouge, Louisiana	MM DOCKET NO. 84-45 File No. BPCT-830603KK

Appearances

Timothy K. Brady, on behalf of Louisiana Super Communications Limited Partnership; *Clifford M. Harrington* and *David D. Oxenford, Jr.*, on behalf of Parish Family Television-Limited Partnership; and *Matthew H. McCormick*, on behalf of Baton Rouge Channel 44, Limited Partnership.

DECISION

Adopted: December 17, 1985; Released: December 26, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. This proceeding involves the mutally exclusive applications of Kay Burns Crochet and Samuel R. Levatino d/b/a Louisiana Super Communications Limited Partnership, (LSC); South Louisiana Television, Inc., John S. Baker, Jr., and Charles C. Gremillion, Jr., d/b/a Parish Family Television-Limited Partnership (Parish); and Brian W. Brady, Linda J. Tallman, and John Clark Nims d/b/a Baton Rouge Channel 44, Limited Partnership (Channel 44) for authority to construct a new television station on Channel 44 at Baton Rouge, Louisiana. By *Hearing Designation Order* (HDO), 47 Fed. Reg. 5675, published February 7, 1984, the above-captioned applications (along with a fourth, which was dismissed during the course of the proceeding pursuant to a settlement agreement) were designated for hearing on the standard comparative issue. Several other issues were designated against various of the applicants, but the only such issue of any significance which remains is to determine whether Parish's proposal is consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules, 47 CFR § 73.610, and, if not, whether a waiver is warranted.

2. In an Initial Decision (I.D.), FCC 85D-39, released June 13, 1985, Administrative Law Judge (ALJ) John H. Conlin concluded that Parish was comparatively the best applicant. Specifically, he determined that the three remaining applicants were equal under the diversification criterion of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), and that LSC deserved a slight preference for comparative coverage. The ALJ found, however, that both Parish and Channel 44 proposed a substantially higher level of ownership integration

than did LSC and that this difference outweighed LSC's comparative coverage advantage. As between Parish and Channel 44, the ALJ found them equal with regard to their proposed coverage and quantitative integration credit (both 100%), but he concluded that Parish was superior on qualitative factors enhancing its integration proposal. He therefore awarded Parish a slight integration preference vis-a-vis Channel 44. I.D. para. 86. Thus, the ALJ's grant of Parish's application rests primarily on his conclusion that Parish was substantially superior to LSC and slightly superior to Channel 44 under the integration criterion.

3. The proceeding is now before the Review Board on exceptions filed by LSC and Channel 44. Parish filed a statement in support of the I.D. and "contingent limited exceptions." The Board has reviewed the I.D. in light of the exceptions and replies, the oral argument held October 25, 1985, and our examination of the record. We adopt the I.D.'s findings of fact and conclusions of law, except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of Parish's application will best serve the public interest, convenience, and necessity.[1]

4. *Integration*: *LSC*. LSC is a Louisiana limited partnership composed of one general partner, Kay Burns Crochet, and one limited partner, Dr. Samuel R. Levatino. Crochet has a 15% ownership interest in the partnership and Levatino, 85%. I.D. paras. 9, 74. LSC proposes to integrate Crochet full time into the operation of the proposed station as General Manager. I.D. para. 29. LSC claims 100% ownership integration credit based on the fact that Crochet is its sole general partner. The ALJ concluded that LSC's limited partnership arrangement was a sham and that it could not be given the full 100% integration credit it claimed. Instead, he credited LSC for Crochet's proposal to work at the station, but only to the degree of integration corresponding to Crochet's equity interest in LSC — 15%. I.D. paras. 73, 76. LSC has excepted to the ALJ's refusal to award it credit for 100% integration.

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[1] On November 25, 1985, Parish and Channel 44 submitted a joint petition for approval of a settlement agreement. This petition was supplemented on December 4, 1985. Under the terms of the agreement, Channel 44's application will be dismissed in return for a cash payment of $75,000, plus a second payment of $75,000 if Parish's application is ultimately granted. The agreement is in conformance with the terms of Section 73.3525 of the Commission's Rules, 47 CFR § 73.3525, and we shall accordingly grant the joint petition and approve the agreement. Since we are dismissing Channel 44's application, we will not address the exceptions pertaining to that applicant.

5. We agree with the ALJ that the record plainly shows that Dr. Levatino, nominally a limited partner isolated from management, is the moving force and controlling principal behind the applicant. LSC's claim of 100% integration therefore cannot be credited. The ALJ made extensive and detailed findings with regard to the factual background of LSC, *see* I.D. paras. 9–28, and the record supports those findings. We will summarize only the more salient facts, which demonstrate Dr. Levatino's dominance. Dr. Levatino is a Baton Rouge dentist and businessman. Ms. Crochet is the wife of a business associate of Dr. Levatino's. She has been a secretary for most of her professional career and iscurrently the secretary of a local judge. I.D. paras. 10, 26, 31. Dr. Levatino petitioned the Commission in his own name to have Channel 44 allocated to Baton Rouge. I.D. para. 11. Ms. Crochet did not become involved until after the FCC allocated the channel and Dr. Levatino asked her if she would serve as general partner. *Id.*; Tr. 50. Dr. Levatino hired Sterling Communications, a broadcast consulting firm, to prepare LSC's application. The contract for preparation of the application was signed by Dr. Levatino before Ms. Crochet became involved. A second contract, dealing with equipment, was also signed by Dr. Levatino. I.D. para. 13. Ms. Crochet did not think that she, as general partner, was liable under either of these contracts. Tr. 53. Dr. Levatino also made the decision to hire LSC's legal counsel (though Ms. Crochet signed the retainer agreement). I.D. para. 14. Furthermore, Dr. Levatino was responsible for obtaining the transmitter site LSC originally specified. When, after the limited partnership agreement was signed, it became necessary to obtain a new site, it was Dr. Levatino who conducted negotiations with the landowner and entered into an agreement. I.D. para. 15. Indeed, Ms. Crochet has discussed virtually every aspect of the application with Dr. Levatino and has followed his advice in every instance. I.D. para. 17; Tr. 71. Moreover, as to LSC's financial arrangements, Dr. Levatino himself prepared the financial plan for the station, Tr. 60, and entered into a bank agreement to provide the financing. Not being familiar with the terms of the agreement, I.D. para. 19, in certifying that LSC was financially qualified, Ms. Crochet had to rely on what she was told by Dr. Levatino. I.D. para. 20. Prior to her deposition in May 1984, Ms. Crochet had paid nothing for her interest in LSC and Dr. Levatino paid all of LSC's expenses, an amount in excess of $12,000. I.D. para. 21. Since the deposition she has paid a proportionate share of the expenses. *Id.*

At her deposition, Ms. Crochet was not aware of the extent of her liability for the partnership losses, but subsequently at hearing she testified that she now knew she was personally liable for all potential losses of the partnership. I.D. para. 27. And finally, it was Dr. Levatino who communicated with the principals of other applicants to discuss the possibilities of settlement, I.D. para. 28, and the LSC limited partnership agreement gives Dr. Levatino's address as LSC's principal office. I.D. para. 24.

6. We concur fully in the ALJ's conclusion that when all of the facts relating to LSC's formation and the prosecution of its application are viewed collectively, LSC's representation that Ms. Crochet will have exclusive authority to manage and control the partnership business and the operation of the station, while Dr. Levatino will play a passive, non-participating role, is not credible. The facts of record overwhelmingly show that Dr. Levatino has been *the* dominant individual in LSC up to the present, and there is nothing to suggest that he will suddenly become uncharacteristically inert in the future, other than bald assertions. We, as the ALJ, are therefore unable to credit LSC's purpoted limited partnerhsip arrangement. We consequently hold that the ALJ did not err in treating Dr. Levatino as a controlling principal of LSC and discounting its integration proposal accordingly. *See Utah Television Associates Limited Partnership*, FCC 85R-98, released December 10, 1985, at para. 25; *cf. KIST Corp.*, 99 FCC 2d 173, 57 RR 2d 49 (Rev. Bd. 1984), *modified*, 58 RR 2d 1483 (1985); *Berryville Broadcasting Company*, 70 FCC 2d 1, 4-8, 44 RR 2d 1325, 1330-33 (Rev. Bd. 1978); *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419, 423-26, 39 RR 2d 1099, 1106-10 (Rev. Bd. 1977).[2]

7. *Parish*. Parish is also a Louisiana limited partnership, and its general partner is South Louisiana Television, Inc. (SOLA), a Louisiana corporation. The principals of SOLA are Mary W. Burge (president, director, and 40% shareholder), Anne G. Trufant (vice-president, director, and 40% shareholder), and Mignon T. Gautreaux (secretary-treasurer, director, and 20% shareholder). I.D. para. 35. SOLA holds a 50% equity interest in Parish. There are two limited partners, John S. Baker, Jr., who holds a 30% equity interest and Charles C. Gremillion, Jr., who holds 20%. I.D. para. 36. Parish proposes to integrate all three principals of SOLA, its general partner, into full-time management positions at

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[2] Although in the circumstances present here the ALJ could have denied LSC integration credit altogether, *see KIST Corp.*, *supra*, his award of 15% credit does not affect the level of Parish's integration advantage. See paragraph 23, *infra*.

the proposed station. Burge is proposed to serve as Station Manager, Trufant as Director of Community Relations, and Gautreaux as Assistant Program Director. I.D. para. 38. The ALJ accepted the validity of Parish's limited partnership arrangement and awarded it 100% integration credit for the participants of the SOLA principals. I.D. para. 79. The ALJ further found that Parish's integration proposal is enhanced by the fact that the SOLA principals all reside within the service area of the proposed station and that all three have been active in civic affairs. He awarded further enhancement credit because Mrs. Burge is a member of a recognized minority group (American Indians) and because all three principals are female. I.D. paras. 42, 82.

8. In its exceptions, LSC charges that the ALJ applied a more rigorous standard in evaluating LSC than he did in evaluating Parish, and claims that the factors the ALJ relied on in disallowing recognition of LSC's limited partnership arrangement are also present with respect to Parish, if not more so. LSC argues that, in consequence, recognition of Parish's limited partnership arrangement must be denied. *Inter alia*, LSC states that just as Dr. Levatino, a limited partner, was instrumental in preparing LSC's application and obtaining financial assurances, so, too, John Baker, a limited partner, was instrumental in preparing Parish's application and obtaining its financial assurances (LSC Exceptions, paras. 43–44); that while Ms. Crochet, LSC's general partner, did not have possession of LSC's checkbook until the time of her deposition in May 1984, Parish's checkbook still is not in the possession of any of its general partners (*id.*, para. 49); and that while the principal address of LSC, as listed in the partnership agreement, is the address of Dr. Levatino, not of Ms. Crochet, Parish's principal address is that of Ms. Trufant's husband, not that of any of the general partners (*id.*, para. 46). We disagree that the discrete elements focused on by LSC support its position. The facts must be viewed as a whole in evaluating whether an applicant's purported structure is really a *bona fide* business arrangement. *See KIST Corp.*, *supra*, 58 RR 2d at 1485–6. *See also The Walmac Co.*, 36 FCC 507, 508 (1964). When this is done, the facts of record relating to Parish present a picture considerably different from LSC's chimera.

9. Before the Parish application was devised, Mary Burge and her husband Glen Burge had (and still have) on file with the Commission an application for a new low power television station to operate on Channel 44 at Hammond, Louisiana. Hammond, their community of residence, is about 35 miles from Baton Rouge

and lies within the Grade B contour of the proposed Parish station involved in this proceeding. I.D. paras. 40, 54. When Channel 44 was allocated for a UHF television station at Baton Rouge, the Burges considered that their low power television application had become worthless (Tr. 222). The Burges then contacted John Baker, a local attorney and law professor, to see if he was interested in putting together an organization to apply for the UHF authorization at Baton Rouge (Tr. 222, 234, 237). they had met Baker sometime before when they visited a television station in conjunction with their low power application, and they consequently knew he had an interest in broadcasting (Tr. 221-22). Essentially, the Burges initiated the concept of a Parish application and then enlisted the legal and business expertise of Baker to assist them in formally setting up the applicant and getting the application on file. Baker, along with the Burges, decided to structure the applicant as a limited partnership with a corporate general partner (Tr. 234-35). Baker recruited the other three principals of Parish and arranged for the necessary financial assurances (Tr. 144, 196, 222-23, 251). The limited partnership agreement itself and various corporate papers relating to SOLA were prepared by the New Orleans law firm of Charles Gremillion, Sr., the father of Charles Gremillion, Jr., and Anne Gremillion Trufant (Tr. 153, 171, 220). The Burges and Baker worked on the preparation of the application (though it was physically prepared by communications counsel) (Tr. 242-43). Glen Burge sought antenna sites and obtained site availability letters. He also reviewed the engineering portion of Parish's application (Tr. 232-33). Baker's and Mary Burge's shares in the applicant were given primarily for services they performed or were to perform (Tr. 241-42). Almost all of the funds which have been paid into Parish have come from Charles Gremillion, Sr., through gifts to his children, Anne Trufant and Charles Gremillion, Jr., to permit them to buy their shares (Tr. 153). As mentioned above, Parish's official address is that of the office of Ms. Trufant's husband, and its public inspection file is kept next door (Tr. 160). Both Parish and SOLA maintain bank accounts (Tr. 239). The checkbooks (of the partnership account, at least)[3] are in the possession of a secretary-bookkeeper of the Family Life Federation, an organization of which Ms. Trufant is executive director and a board member and Mr. Baker is "president of the board" (Tr. 144, 163, 176). This bookkeeper is located in Ms. Trufant's office (Tr. 163,

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[3] Questioning was directed toward the partnership account only, so the record is vague regarding the corporate account.

178). The signatories of both the partnership and corporate accounts are Trufant, Gautreaux, and Burge, the three stockholders of SOLA, and two of the three must sign each check (Tr. 177, 239). Mr. Baker serves as local counsel for both Parish and SOLA. The principals of SOLA testified, however, that they consulted him only infrequently about partnership business and that he did not make any decisions on behalf of the limited partnership (Tr. 146, 179, 202, 231). He also does not ordinarily attend the SOLA directors' meetings (Tr. 204, 230–231).

10. The record summarized above shows that Parish is an enterprise created by and involving a number of persons and that the principals and others associated with it have performed a variety of functions. Their actions in forming the partnership and prosecuting the application are not inconsistent, however, with a valid partnership arrangement; that is, unlike LSC (see paragraphs 5–6, *supra*), the principals of the general partner and the limited partners have functioned in a manner commensurate with the roles normally associated with limited partnerships. *See Family Media, Inc.*, 59 RR 2d 165, 166 n. 4 (Rev. Bd. 1985). Thus, we agree with the ALJ that there is nothing but unsupported speculation to suggest that the limited partners of Parish will be other than passive investors. Parish's limited partnership arrangement will be fully credited.

11. Both LSC and Channel 44 assert that the ALJ erred in awarding Parish integration credit for Mignon Gautreaux's proposed participation as Assistant Program Director. The exceptors claim that no integration credit should be given for Gautreaux because her involvement in Parish is so tenuous and her stake in the company so slight that she cannot be considered to be an owner, and because the position she proposes to occupy, Assistant Program Director, is not the sort of managerial level position for which integration credit may be awarded. The challenge on the first point is based on the fact that Gautreaux has contributed only ten dollars for her twenty percent interest in SOLA and the assertion that she has neither been involved in nor is knowledgeable about Parish's affairs. We reject these contentions. First of all, while Ms. Gautreaux's present financial stake in SOLA is clearly token and she lacks past broadcast experience as an alternative rationale for being included, we note that she testified that she had agreed to put more money into SOLA if it became necessary (Tr. 203), and Ms. Trufant also understood that Ms. Gautreaux's contribution included a promise to provide additional funds in the future (Tr. 152). In any event, financial investment is

not a *sine qua non* for crediting an ownership interest for integration purposes, especially in the case of a general partner in a limited partnership.[4] *See KIST Corp., supra*, 58 RR 2d at 1485, where the Commission emphasized that the pertinent inquiry is whether there has been a good faith division of ownership and whether it appears from the record that a questioned principal will have a legitimate interest and influence in the applicant. Here, the record demonstrates that Ms. Gautreaux has been an active participant in SOLA (and, through it, Parish), that she has attended meetings of the SOLA board of directors and voted on the matters under discussion, that she has taken minutes of the meetings in accordance with her position as secretary of the corporation, and that she is familiar with various matters pertaining to Parish's application. *See* I.D. para. 51; Tr. 231, 274. On balance we conclude that Ms. Gautreaux's 20% share in SOLA represents a good faith division of ownership and that she will have a legitimate interest and influence in SOLA and Parish. In consequence we find that the ALJ did not err in treating Ms. Gautreaux as an owner of Parish eligible for integration credit. *See KIST Corp., Supra*; *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 426-27, 55 RR 2d 627, 631 (Rev. Bd. 1983), *rev. denied*, 56 RR 2d 1394 (Comm'n 1984).

12. We also find that Ms. Gautreaux's proposed integration into the management of the Parish station as Assistant Program Director is entitled to integration credit. Ms. Gautreaux proposes to occupy that position full time. The ALJ credited the testimony that in fulfilling this function Ms. Gautreaux would work with the Programming Director (as yet unnamed) in establishing and supervising the program department, that she would formulate local programs and participate in the acquisition of syndicated material, that she would supervise the editing staff to ensure that program material conforms to station standards and practices, that she would be involved in all employment decisions involving the programming staff, and that she would co-supervise all news and public affairs programming. I.D. para. 47. The ALJ correctly stated that the test set out in the *Policy Statement, supra* for determining whether integration credit is due is the extent of an individual's policy functions and the likelihood of that person's playing important roles in management. I.D. para. 79. Under this test, the ALJ concluded, and we agree, that Ms. Gautreaux's

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[4] Although Mrs. Burge contributed only $20 for her 40% interest in SOLA, she also contributed substantial work in preparing the Parish application (Tr. 152, 242).

specified duties involve management and policy-making functions, and that it is reasonable to believe that she will actually perform those duties and that her influence will be buttressed by her key position in SOLA. *Id.*

13. *High Sierra Broadcasting, Inc., supra*, relied on by LSC and Channel 44 to attach Ms. Gautreaux's role, does not support their position. That decision involved a situation where, though an individual was proposed as an assistant in two areas, he was to have no day-to-day duties in either area, a circumstance that led the ALJ to conclude that the individual's role was too imprecise to warrant integration credit. Further, the positions were part-time, and the Commission has stated that credit for integration falls off sharply as time spent falls below full time.[5] In those circumstances, the board affirmed the ALJ's decision not to allow credit. *Id.* at 428, 55 RR 2d at 633.[6] Other cases cited by the exceptors, *Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 56 RR 2d 275 (Rev. Bd. 1984) (no integration credit for gathering ideas and hosting show, but credit given for two individuals who would be involved in various aspects of producing community affairs programming), *rev. denied*, 57 RR 2d 1390 (Comm'n 1985); *Bradley, Hand, and Triplett*, 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982) (no credit for filing, bookkeeping, speaking to clients, interviewing possible employees, etc.); *New Continental Broadcasting Company*, 88 FCC 2d 820, 50 RR 2d 1117 (Rev. Bd. 1981) (no credit for individuals who would spend a few hours a week researching, formulating, and broadcasting various programs), *remanded on other grounds*, 93 FCC 2d 1275, 53 RR 2d 1004 (1983); and *Vactionland Broadcasting Co., Inc.*, 97 FCC 2d 485, 55 RR 2d 1299 (Rev. Bd. 1984) (no credit for supervising and managing the traffic and bookkeeping departments, plus some sales work), *rev. denied*, FCC 85-275 (Comm'n 1985), are also not persuasive. In each of those decisions, where credit was disallowed, there were clear indications in the record that the individuals would spend most or all of their time performing non-managerial type functions. Here, the ALJ concluded that Ms. Gautreaux would be involved in managerial and policy-making functions, and we believe the record supports that conclusion. Parish is entitled to full credit for her proposed

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[5] *See Policy Statement, supra*, 1 FCC 2d at 395, 5 RR 2d at 1909.

[6] *See also High Sierra Broadcasting, Inc.*, 96 FCC 2d 439, 469 (ALJ 1983) (Initial Decision).

participation in the operation of the station.

14. Finally, LSC and Channel 44 assert that Parish's integration proposal must be rejected since the evidence shows that its principals intend to abdicate management of the station. They state that none of the three SOLA principals has any broadcasting experience (I.D. para. 52) and that they intend to hire an outsider to serve as General Manager (Tr. 157, 259). LSC and Channel 44 claim that these facts, coupled with a SOLA corporate resolution (Channel 44 Exh. 5) authorizing the engagement of Ditchfield, Watson, and Williams, a California consulting firm, to provide "general management" for the station, demonstrate that the SOLA principals intend to "farm out" the management of the station, and that therefore their integration proposal cannot be credited. We disagree. The resolution referred to was subsequently "clarified" by a second resolution (Channel 44 Exh. 4) stating that it was intended that the Ditchfield firm would only advise the SOLA board of directors and that the board would be exclusively responsible for the stations' management. The principals of SOLA testified that they considered the Ditchfield firm because their lack of experience initially created a need for consulting advice on operating the station (Tr. 156, 188, 227). However, no contract was ever signed, no decision to hire the firm had been made as of the time of the hearing, and there has been no contact with the firm since the adoption of the first resolution. I.D. para. 52; Tr. 155-56, 228. We concur fully in the ALJ's judgment that it was perfectly reasonable for the SOLA principals, given their lack of experience, to believe they would need assistance in setting up and operating a television station. I.D. para. 78. There is nothing in the record to suggest, however, that these plans would interfere with or be substituted for the proposed integration of the three SOLA principals into the management of the station.

15. *Parish's Engineering Qualifications*. In the HDO, *supra*, at paras. 7 and 9, the Commission noted that Parish's application specified a transmitter site that did not appear to meet the minimum mileage separation requirements of Section 73.610 of the Rules and specified an issue to determine whether a waiver of that rule was warranted. On March 8, 1984, the thirtieth day following publication of the HDO in the Federal Register, Parish requested a 15-day extension of time in which to submit an amendment "as of right" in order to cure the short-spacing issue, and the ALJ granted the request by Order, FCC 84M-1463, released March 23, 1984. That same day, Parish filed its engineering amendment. The ALJ accepted the amendment by

Order, FCC 84M-2053, released May 1, 1984; denied Channel 44's April 9, 1984 motion to dismiss Parish's amended application by Memorandum Opinion and Order, FCC 84M-2467, released May 30, 1984; and granted Parish's motion for summary decision on the short-spacing issue by Order, FCC 84M-3044, released July 11, 1984.

16. The exceptions of LSC and Channel 44 challenge all four of the ALJ's above-referenced orders. In addition, while conceding that, under Section 1.115(e)(3) of the Rules, 47 CFR 1.115(e)(3), applications for review of a hearing designation order are deferred until applications for review of a final Review Board Decision are filed, unless an ALJ certifies the matter for earlier review by the Commission *en banc*, and that the HDO herein is therefore not subject to review at this time, the parties nevertheless assert that the Mass Media Bureau committed reversible error by designating Parish's originally short-spaced application for hearing instead of dismissing it. Cognizant that under *Frank H. Yemm*, 39 RR 2d 1657 (1977), the Board lacks authority to review the propriety of hearing designations made pursuant to delegated authority, because the designation of Parish's application lies at the heart of the exceptions that are properly before us and because it appears to us that Parish's application was treated consistent with recent Commission precedent,[7] We will assume *arguendo* the propriety of

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[7] Originally, when the Commission was presented with short-spacing waiver requests where mutually exclusive applications proposed non-short-spaced sites, it dismissed non-conforming applications prior to hearing designation. *See, e. g., Trend Broadcasting, Inc.*, 18 FCC 2d 749, 16 RR 2d 703 (1969). However, beginning with *Nelson County Broadcasting Co.*, 64 FCC 2d 932 (1977), the Commission designated a short-spaced FM application for hearing after denying a waiver request on the merits but gave the applicant 30 days to amend to a non-short-spaced site or face dismissal. When another applicant in the same proceeding was also short-spaced but did not accompany its application witha waiver request, the Commission dismissed its application pursuant to Section 1.566(a) of the Rules [now Section 73.3566(a)] but later accepted the application *nunc pro tunc* on reconsideration and designated it for hearing when it was amended to specify a non-short-spaced site. 64 FCC 2d at 933 n. 2. On the other hand, in *Amherst Broadcasting, Inc.*, 44 RR 2d 1548 (1978), the Commission denied an FM short-spacing waiver request prior to designation but did not dismiss the application; it allowed 30 days for amendment. Finally, in *Clay Television, Inc.*, 46 Fed. Reg. 50600, published October 14, 1981, and *Powell Community Television*, 49 Fed. Reg. 32460, published August 14, 1984, as in the instant case, a television application was designated for hearing on a short-spacing issue, with no amendment ultimatum, even though no short-spacing waiver had been sought. This history demonstrates an evolving policy of leniency in the face of short-spaced applications, which allows notice and opportunity for amendment prior to dismissal and which even permits the designation of short-spaced television applications for hearing on waiver issues without requiring amendments. *Clay, Powell,* and the instant case also reveal that, at least in television cases, the absence of a pre-designation short-spacing

the Bureau's action and will rule on the exceptions without first certifying the designation matter to the Commission. (In so doing, we also observe the apparent conflict between *Yemm*, which invites Board certification of such matters, and Section 1.115(e)(3), which appears to prohibit Board action by certification or on the merits.)

17. Essentially, LSC and Channel 44 maintain that Parish's March 23, 1984 engineering amendment should not be viewed as an amendment "as of right" under Section 73.3522(b)(2) and either should be required to meet the stringent "good cause" acceptance standards of Section 73.3522(b)(1) of the Rules, which applies to post-designation engineering amendments that are not "as of right," or should be treated as a "major change" amendment, thereby resulting in the dismissal of Parish's application. We reject all three suggestions and affirm the ALJ's acceptance of the amendment "as of right" and his subsequent award of summary decision in Parish's favor on the short-spacing issue.

18. Under Section 73.3522(b)(2), an amendment may be filed "as a matter of right" if it relates to "issues first raised in the designation order." *Id.* It cannot be gainsaid that the subject short-spacing matter is such an issue, for neither Parish nor any of the other applicants in this proceeding ever discussed this point in their application or pre-designation pleadings.[8] Thus, treating it as "first raised" in the HDO is consistent with the U.S. Court of Appeals' gloss on that phrase in *Cleveland Television Corp.* v. *FCC*, 732 F. 2d 962, 965 n. 2 (D.C. Cir. 1984).

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waiver request is not automatically equated with a "patent" defect warranting application dismissal under Section 73.3566(a). Since the designation of a short-spacing issue has the inherent effect of allowing 30 days for a post-designation curative amendment as of right, pursuant to Section 73.3522(b)(2) of the Rules, 47 CFR 73.3522(b)(2), and since Parish actually amended in the instant case, we see no significant difference between the Bureau's treatment of Parish's application and the *Nelson* and *Amherst* procedures. Moreover, we concur with the Bureau's judgment that, as a matter of substance, Section 73.3566(a) does not itself mandate the dismissal of all short-spaced applications that are unaccompanied by waiver requests — only those "which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements." *Id.* Parish's unamended application was apparently not one of them. *Cf. Clay Television, Inc., supra*, in which the Bureau grantaed two short-spacing waiver requests *sua sponte*, where it was clear that the potential interference due to short-spacing would be insignificant. *See also North Texas Media, Inc.* v. *FCC*, No. 84-1511 (D.C. Cir. December 1985).

[8] Ironically, it was the very Bureau staff that Channel 44 castigates several times in its Brief (at 24, 25, 30) for "sloppiness" and "miscues" which was the only entity that detected any short-spacing difficulty with Parish's application prior to designation!

See also Opal Chadwell, MM Docket No. 85-269, FCC 85M-4187, released October 29, 1985 (ALJ), in which a short-spacing amendment was accepted under circumstances almost identical to the instant case. We reject Channel 44's assertion that Parish "knew or should have known" (Br. at 27) about the short-spacing prior to designation and that such "knowledge" constituted prior "raising" of the issue. Unlike the unsuccessful applicant in *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 53 RR 2d 1203 (Rev. Bd. 1983), *aff'd per curiam sub nom. Royce International Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Cir. April 30, 1985), there is no evidence here that Parish had any prior knowledge of its site problem nor has Channel 44 offered any explanation why Parish would conceal such a supposedly "obvious" and "egregious" deficiency (Br. at 27, 33) and risk early dismissal of its application.

19. Moreover, even if we agreed that Parish's amendment should be subjected to the "good cause" standards of Section 73.3522(b)(1), we note that the ALJ concluded in FCC 84M-2467, *supra*, at n. 2, that good cause existed for accepting the amendment, and we affirm that judgment. Under the criteria of *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970), as modified by *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 49 RR 2d 1589 (1981), the amendment was diligently filed, successfully addressed a potentially disqualifying defect, did not cause any delay or disruption, did not give rise to any additional hearing issues, and did not permit Parish to gain a comparative advantage. As to the stricter foreseeability test required for post-designation engineering amendments, *California Broadcasting Corp.*, 90 FCC 2d 800, 809, 51 RR 2d 1539, 1545 (1982), we believe that the failure of Parish or any other applicant to identify Parish's engineering problem prior to designation belies any notion that the problem was readily (or reasonably) knowable (or foreseeable). *See Shoblom Boradcasting, Inc., supra.* Furthermore, refusing an otherwise proper amendment on foreseeability grounds alone would render nugatory the HDO's procedural leniency in designating a short-spacing issue against Parish instead of dismissing its application outright (see note 8, *supra*). *Cf. Clay Television, Inc.*, 95 FCC 2d 1167, 1169-72 and n. 8 (Rev. Bd. 1983), *rev. denied*, FCC 85-356 (Comm'n 1985) (short-spacing waiver denied where non-short-spaced sites available and no site amendment filed).

20. Finally, LSC and Channel 44 argue that even though it is "generally true" that the "major change" amendment processing rules do not apply to post-designation amendments, citing *California Broadcasting Corp.*, *supra*, in the instant case the then-applicable new file number provisions of Section 73.3572 of the Rules, 47 CFR 73.3572, should be applied and Parish's application, as amended, should be dismissed. To do otherwise, according to LSC and Channel 44, will create a "gaping loop hole" (LSC Br. at 18) in the Commission's processes whereby a necessary major engineering amendment, which would doom an application if filed pre-designation, may be "slipped through" after designation without penalty for the applicant's lack of diligence. There is no case precedent for the exceptors' novel and draconian recommendation, and we will therefore adhere to the teaching of *California Broadcasting Corp., supra*. We do not perceive (nor have we been directed to any evidence of) chicanery or culpable ineptness in Parish's conduct, unlike *Trefoil Broadcasting Co., Inc.*, 94 FCC 2d 928 (Rev. Bd. 1983), *rev. granted in part sub nom. Royce International Broadcasting Co.*, FCC 84-588 (Comm'n 1984), in which a combination of pre- and post-designation engineering amendments was rejected because they affected a major change and lacked good cause for the errors and delays involved. Parish merely followed the post-designation amendment procedure invited by the HDO and authorized by Section 73.3522(b), and we will not fault the applicant for it.

21. *Comparative Coverage*. The ALJ awarded LSC a slight comparative coverage preference over Parish and Channel 44, which he considered equal to one another, to reflect a 9.6% overall service advantage over Parish and a 36.7% advantage over Channel 44 (1,606,308 persons versus 1,451,753 and 1,016,257, respectively) and the fact that LSC will provide new third and fourth services to 13,765 more people than Parish (64.7%) and to 10,577 less people than Channel 44 (33.2%). I.D. paras. 68-69. LSC and Channel 44 both except to the fact that the ALJ based his coverage findings for Parish on the latter's March 23, 1984 post-designation engineering amendment, even though that amendment was accepted with the condition that no "coverage advantage" would attach, FCC 84M-2467, *supra*, at n. 2. We affirm the ALJ's methodology, which relies on our recent decision in *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 57 RR 2d 662 (Rev. Bd. 1984), *recon. denied*, 100 FCC 2d 469, 57 RR 2d 1363 (Rev. Bd. 1985), for two reasons. First, because Parish's amend-

ment was properly accepted by the ALJ as a matter of right and for good cause shown, Parish was entitled to the full comparative benefit of that amendment. *Santee Cooper, supra,* 99 FCC 2d at 799-803, 57 RR 2d at 678-81; paras. 17-19, *supra.* Second, as the ALJ found, I.D. para. 65 n. 8, a comparison of Parish's pre- and post-designation proposals (Joint Exh. 1, Figures 8 and 9) reveals that the post-designation amendment conferred no advantage; rather, Parish actually lost more than 500,000 in population and ceased offering service to areas with two or less existing services.

22. What remains for examination is whether, given the ALJ's above findings, he awarded the appropriate coverage preference to LSC. (Since Channel 44's application is being dismissed, we need not review its coverage claims.) We conclude that he did. *See CJL Broadcasting, Inc.*, 88 FCC 2d 750, 50 RR 2d 1159 (Rev. Bd. 1981), *reversed on other grounds*, 95 FCC 2d 544, 54 RR 2d 1037 (1983). LSC's 13,765-person third and fourth service advantage over Parish includes providing a third service to 11,938 persons, while Parish will not provide anyone with a third service. Moreover, LSC will offer a fourth service to 1827 more people than Parish, and, in terms of third through fifth services, LSC has a 31,910-person advantage (49.3%) over Parish. However, these advantages are miniscule compared to LSC's overall population coverage of 1,606,308 persons (less than 2%), and, under such circumstances, they yield no more than a slight preference. *CJL Broadcasting, Inc., supra; cf. Metro Broadcasting, Inc.*, 99 FCC 2d 688, 57 RR 2d 440 (Rev. Bd. 1984), *rev. denied,* FCC 85-558 (Comm'n 1985) ("slight to moderate" preference awarded for superior fourth and fifth services where 141,076-person differential represented 57.7% advantage over opponent's proposal and was 9.6% of the overall population coverage).

23. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. Parish is entitled to 100% quantitative credit for its integration proposal. LSC is entitled to, at most, only 15% integration credit. With such a significant quantitative difference Parish deserves a substantial preference over LSC on the integration criterion. *See Radio Gaithersburg, Inc.*, 22 FCC 2d 820, 828-29, 45 RR 2d 1709, 1714-15 (Rev. Bd. 1979). On the other hand, LSC is entitled to a slight preference over Parish for the better coverage of its proposed station. However, Parish's substantial integration preference significantly outweighs LSC's slight coverage preference and makes Parish the clear winner under the standard comparative issue. *Cf. FBC, Inc.*, 95 FCC 2d 256, 55 RR 2d 1344 (Rev. Bd.

1983) (substantial coverage preference outweighs substantial integration preference), *rev. denied,* FCc 85-309 (Comm'n 1985).

24. *Other Matters.* On August 15, 1985, LSC filed a Petition to Reopen the Record and Enlarge Issues. In this petition LSC requests that site availability and financial qualifications issues be added against Parish. LSC also asks that Parish be given a substantial comparative demerit for carelessness and ineptitude. As discussed above, Parish amended its application subsequent to designation to specify a new site as a result of the short-spacing problem with Parish's original site. The new site is the same one that LSC had originally specified, a site owned by a Mr. Nathan H. Dekle. In its petition LSC claims that Parish has never had reasonable assurance that the site would be available to it, and that the record should be reopened and the requested issues added. Channel 44 supports LSC's petition.[9]

25. We will deny LSC's petition. The request is based primarily on an affidavit by Mr. Dekle, dated August 9, 1985, supplemented by a second affidavit of September 20, 1985. In these affidavits, Mr. Dekle essentially says that he agreed in the spring of 1984 only to *discuss* with Parish the leasing of the property in the event that LSC's application was denied, or if for some other reason LSC did not want the site. However, in its response to LSC's petition, Parish submitted a copy of a letter from Glenn Burge to Mr. Dekle dated March 19, 1984. The letter states that it is intended to confirm a previous discussion in which Dekle agreed to "work with" Parish to supply a tower site should Parish be the successfrul applicant. It also describes the piece of property discussed, states that a 2000-foot tower with the necessary guy wires would be erected on the southernmost portion of the property, and it further states that the property would be leased for no less than twenty-five years at a fair market value. The letter bears Mr. Dekle's signature, also dated March 19, 1984, in acknowledgment. We find that this letter, acknowledged by the property owner, provided sufficient reasonable assurance for Parish to believe that the property would be available to it. *See High Sierra Broadcasting, Inc., supra,* 56 RR 2d at 1397; *William F. Wallace,* 49 FCC 2d 1424, 1427, 32 RR 2d 105, 109 (Rev. Bd. 1974); *cf. Alden Communications Corp.,* FCC 85R-90, released November 7, 1985 (Rev. Bd.) (reasonable assurance questioned where no negotiated understanding on any lease

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[9] Since Channel 44 put forward additional assertions, we will grant Parish's September 23, 1985 Motion for Leave to File Response to Channel 44's Comments.

terms). The recent affidavits of Mr. Dekle raise the possibility that Parish's site may no longer be available. His statements are so ambiguous, however, as to what he would do in the event that LSC's application is ultimately denied, and Parish's granted, that they do not provide an adequate basis for the addition of an issue at this time to determine if the site is currently available to Parish.[10] *See Alexander S. Klein, Jr.*, 56 FCC 2d 788, 779, 35 RR 2d 945, 947 (Rev. Bd. 1975). We will consequently deny LSC's petition to enlarge issues.[11]

26. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend, filed by Baton Rouge Channel 44, Limited Partnership, on July 10, 1985, IS GRANTED, and the tendered amendment IS ACCEPTED; and

27. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Agreement, filed on November 15, 1985, by Parish Family Television-Limited Partnership and Baton Rouge Channel 44, Limited Partnership, and supplemented on December 4, 1985, IS GRANTED, that the settlement agreement IS APPROVED, and that the application of Baton Rouge Channel 44, Limited Partnership, (File No. BPCT-830603KK) IS DISMISSED; and

28. IT IS FURTHER ORDERED, That the Motion for Leave to File Response, filed by Parish Family Television-Limited Partnership on September 23, 1985, IS GRANTED, and the response IS ACCEPTED; and

29. IT IS FURTHER ORDERED, That the Petition to Reopen the Record and Enlarge Issues, filed by Louisiana Super Communications Limited Partnership on August 15, 1985, IS DENIED, and the Contingent Motion to Enlarge Issues, filed by Parish Family Television-Limited Partnership on November 12, 1985, IS DISMISSED; and

30. IT IS FURTHER ORDERED, That the application of Louisiana Super Communications Limited Partnership (File No. BPCT-830602KK) IS DENIED, and the application of Parish

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[10] Even if the site has now become unavailable to Parish, it would upon a showing of good cause be permitted to amend its application to specify a new site. *See also Anax Broadcasting, Inc., supra*, 87 FCC 2d at 488-89, 49 RR 2d at 1594; *Erwin O'Conner Broadcasting, Inc., supra*, 22 FCC 2d at 143, 18 RR 2d at 824.

[11] Also pending before the Board is a "Contingent Motion to Enlarge Issues," filed on November 12, 1985, by Parish. In this petition Parish asks that, in the event that the Board does not affirm the ALJ's decision, an issue should be added and the proceeding remanded to determine if LSC has violated the Commission's *ex parte* rules. Since we are affirming the I.D., we will dismiss Parish's petition as moot.

Family Television-Limited Partnership (File No. BPCT-830603KE) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 85D-39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Kay Burns Crochet and Samuel R. Levatino d/b/a LOUISIANA SUPER COMMUNICATIONS, LIMITED PARTNERSHIP Baton Rouge, Louisiana	MM DOCKET NO. 84-43 File No. BPCT-830602KK
South louisiana Television, Inc., John S. Baker, Jr., and Charles C. Gremillion, Jr., d/b/a PARISH FAMILY TELEVISION-LIMITED PARTNERSHIP Baton Rouge, Louisiana	MM DOCKET NO. 84-44 File No. BPCT-830603KE
Brian W. Brady, Linda J. Tallman and John Clark Nims d/b/a BATON ROUGE CHANNEL 44, LIMITED PARTNERSHIP Baton Rouge, Louisiana	MM DOCKET NO. 84-45 File No. BPCT-830603KK

Appearances

Timothy K. Brady, Esq. on behalf of Louisiana Super Communications, Limited Partnership; *Clifford M. Harrington, Esq.* and *David D. Oxenford, Jr., Esq.* on behalf of Parish Family Television-Limited Partnership; *Matthew H. McCormick, Esq.* and *Cheryl A. Kenny, Esq.* on behalf of Baton Rouge Channel 44, Limited Partnership; and *Stephen Yelverton, Esq.* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued: June 10, 1985; Released: June 13, 1985

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Louisiana Super Communications, Limited Partnership (LSC), Parish Family Television-Limited Partnership (Parish) and Baton Rouge Channel 44, Limited Partnership (Channel 44) for a construction permit for a new television station to operate on Channel 44 at Baton Rouge, Louisiana.[1]

2. The applications were designated for hearing on the following issues (MM 2117, released January 30, 1984):

> 1. To determine with respect to Spondo, Ltd., Inc., and Parish Family Television-Limited Partnership, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 2. To determine with respect to Kay Burns Crochet and Samuel R. Levatino d/b/a Louisiana Super Communications Limited Partnership, whether circumstances exist which would warrant a waiver of Section 73.685(e) of the Commission's rules.
>
> 3. To determine, with respect to South Louisiana Television, Inc., John S. Baker, Jr. and Charles C. Gremillion, Jr. d/b/a Parish Family Television-Limited Partnership, whether the application is consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules, and if not, whether circumstances exist which would warrant a waiver of the rule.
>
> 4. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. Issue No. 1 was resolved in Parish's favor through the grant of a pre-hearing Motion for Summary decision. *Order*, FCC 84M-3044, released July 11, 1984.

4. Issue No. 2 concerned the directional antenna originally specified in LSC's application. In response to designation of the issue, LSC amended its application to specify a nondirectional antenna. That amendment was accepted by *Order*, FCC 84M-2064, released May 1, 1984. The Presiding Judge ruled that acceptance of the amendment rendered Issue No. 2 moot. Tr. 31.

5. Issue No. 3 was designated because Parish's original transmitter site was substantially short-spaced to the transmitter site specified by several applicants for Channel 44 at Pensacola, Florida. On March 23, 1984, Parish filed an amendment specifying

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[1] A fourth application, that of Spondo Ltd., Inc., was dismissed pursuant to a settlement agreement. *Order*, FCC 84M-3238 released July 23, 1984.

a properly-spaced transmitter location. The amendment was accepted by *Order*, FCC 84M-2053, released May 1, 1984. Subsequently, Parish's Motion for Summary Decision of the short-spacing issue was granted. *Order*, FCC 84M-3044, released July 11, 1984.

6. Accordingly, only the standard comparative issue remains for consideration.

7. A pre-hearing conference was held April 4, 1984. The initial hearing sessions were held July 9, and 10, 1984. The record was first closed July 23, 1984. *Order*, FCC 84M-3238, released July 23, 1984. Subsequently, it was discovered that nearly all of the cross-examination of Channel 44 witness Brian Brady had been omitted from the transcript. Following an October 19, 1984 hearing conference, the record was reopened to have Mr. Brady testify again. *Order*, FCC 84M-4500, released October 22, 1984. The further hearing session was held on November 27, 1984. At the conclusion of that session, the record was again closed. Tr. 393.

8. Proposed findings and conclusions were filed on February 12, 1985 and replies thereto were submitted on March 8.

Findings of Fact

Louisiana Super Communications, Limited Partnership

9. *Ownership*. LSC is a limited partnership organized under Louisiana law for the purpose of prosecuting LSC's application in this proceeding. The partnership nominally is composed of one general partner and one limited partner: Kay Burns Crochet, general partner, 15%; Samuel R. Levatino, limited partner, 85%. LSC's Limited Partnership Agreement states that the general partner has exclusive authority to manage and control the business and affairs of the partnership. LSC Ex. 1, p. 12. LSC claims that its limited partner will not participate in the management or control of the station. *Id.*, p. 2.

10. *Background*. Dr. Levatino is a Baton Rouge dentist and businessman. He is also Chairman of the Board and the largest stockholder of the First National Bank of East Baton Rouge, and is actively involved in other business enterprises. Tr. 81-82. Ms. Crochet's husband and Dr. Levatino have been friends since childhood (Tr 89), and Mr. Crochet is presently an Assistant Vice President of First National Bank, having been hired on the recommendation of Dr. Levatino. Tr. 82, 88.

11. Dr. Levatino petitioned in his own name to have Channel 44 allocated to Baton Rouge. Ms. Crochet took no part in the FCC filings leading to the allocation. Tr. 48–49. Subsequent to the allocation being made, Dr. Levatino asked Ms. Crochet whether she would serve as general partner in an applicant for the Baton Rouge channel and she agreed to do so. Tr. 50–51.

12. *Preparation of LSC's Application.* Ms. Crochet initially testified that preparation of the application began before she agreed to serve as general partner. But in response to a follow-up question she changed her testimony, stating she could not recall whether application preparation began before or after she agreed to be general partner. Tr. 51.

13. In any case, Ms. Crochet was not responsible for preparation of the application. Rather, Sterling Communications, a broadcast consulting firm Dr. Levatino hired prior to the formation of the partnership, prepared the application under contract. Ms. Crochet testified that the contract was signed not by her, but "probably" by Dr. Levatino. Tr. 51–52. A second contract with Sterling Communications, which Ms. Crochet believed "might have to do with something about equipment" for the station, also was signed by Dr. Levatino. Tr. 53. Prior to the filing of LSC's application, Ms. Crochet talked only once to any respresentative of Sterling Communications. Tr. 54.

14. Dr. Levatino made the decision to hire LSC's legal counsel upon the recommendation of Sterling Communications. Ms. Crochet, however, signed the retainer agreement. Tr. 69–70.

15. Dr. Levatino was responsible for obtaining authority to use the transmitter site LSC initially specified. Ms. Crochet had no role in obtaining the site. Tr. 55–56. When it became necessary for LSC to obtain a new transmitter site, Dr. Levatino – not Ms. Crochet – conducted negotiations and entered into an agreement with the land owner. Those negotiations took place after LSC's Limited Partnership Agreement was signed. Ms. Crochet has never visited either the first or the second transmitter site. Tr. 56–58.

16. LSC's equal employment opportunity plan was prepared by Sterling Communications. Ms. Crochet had no input, even though as proposed General Manager of the station she supposedly would be the person responsible for implementing the plan. Tr. 60–61.

17. Ms. Crochet acknowledged that she has discussed virtually every aspect of the application with Dr. Levatino and followed his advice or, as she put it, "agreed with him" in every instance. Tr. 71. For example, Dr. Levatino even had input into the decision to

include an auxiliary power proposal in LSC's application. Tr. 67-68.

18. *LSC's Budget and Finances.* Ms. Crochet did not prepare the budget or financial plan for the proposed station. In fact, as of the hearing, no budget had been prepared. She had never seen documents estimating the station's construction costs. Nor had Ms. Crochet ever spoken with any potential lender or equipment supplier. Tr. 118.

19. Dr. Levatino, she testified, entered into an agreement with a bank regarding the station's financing prior to the formation of LSC. Ms. Crochet has seen the document, but she was not a signatory. She did not know whether the agreement with the bank requires Dr. Levatino to personally guarantee the repayment of any funds borrowed. Tr. 40-41, 63-65.[2]

20. By signing LSC's application, Ms. Crochet certified that the applicant was financially qualified. She based that certification on the information Dr. Levatino provided her. Tr. 60.

21. Ms. Crochet paid nothing for her interest in LSC until after depositions had been taken in this proceeding — more than 13 months after LSC originally filed its application.[3] Prior to Ms. Crochet's desposition, Dr. Levatino had paid all of LSC's expenses. Those expenses, Ms. Crochet acknowledged, were substantial — in excess of $12,000. Tr. 114-15. Prior to Ms. Crochet's deposition, all of LSC's bills were paid with cashier's checks, using funds from Dr. Levatino's account. While a checking account for LSC had been established previously, Ms. Crochet obtained possession of the checkbook only on the day of her deposition. As of the time she was deposed, she had never used that checkbook. Tr. 95-97. Since the time of her deposition Ms. Crochet has paid her proportionate share of LSC's expenses. Tr. 115.

22. Ms. Crochet said the question of whether she was going to be paid a salary as General manager had not "really been discussed yet." Tr. 100. Her cross-examination included the

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[2] Other than the Limited Partnership Agreement, no written agreement obligates Dr. Levatino to provide funds to LSC. Tr. 66. The Limited Partnership Agreement does not set a specific dollar amount that Dr. Levatino is obligated to contribute. *See* LSC Ex. 1, pp. 8 & 25 (para. 7.1 and ex. B of LSC's Limited Partnership Agreement).

[3] Ms. Crochet's deposition was taken in May 1984. LSC originally filed its application on April 1, 1983; on June 2, 1983, it filed a major amendment, resulting in the assignment of the file number listed in the caption of this proceeding.

following exchange:

> Q: You don't know if your going to receive a salary?
>
> A: I really don't know.
>
> Q: If your are going to receive a salary, who will make the decision of how much you're going to receive, or whether you'll receive one at all?
>
> A: Probably based on counsel and consultants and what they feel is best for the station.
>
> Q: So the consultants are going to tell you what to pay yourself as General Manager; is that right?
>
> A: They'll have some input into it.
>
> Q: Will Dr. Levatino have some input into it?
>
> A: Sure.

Tr. 100–01.

23. *LSC's Limited Partnership Agreement*. Ms. Crochet stated she believed that a Mr. Theissen of Sterling Communications was responsible for preparation of LSC's Limited Partnership Agreement. She, however, did not instruct him to prepare the document. She was not certain whether that instruction came from Dr. Levatino or if Mr. Theissen simply prepared the Agreement and sent it to the LSC principals for review. She was sure, however, that Dr. Levatino was the one who told Mr. Theissen that LSC was proceeding in the form of a limited partnership. Tr. 58.

24. Ms. Crochet did not file LSC's Limited Partnership Agreement with the Louisiana Secretary of State and does not recall who did. Tr. 59.[4] The Agreement lists Dr. Levatino's address as LSC's principal office. Tr. 113–14.

25. Section 8.1 of LSC's Limited Partnership Agreement (LSC Ex. 1, p. 9) provides: "The net profits and losses of the Partnership for each fiscal year will be allocated among the partners in the percentages set forth on Exhibit B." Exhibit B of the Limited Partnership Agreement (LSC Ex. 1, p.25) lists only Dr. Levatino, indicating that he is to be allocated 85% of the profits and losses. Ms. Crochet's name does not appear anywhere on Exhibit B. At the hearing she was asked, "So under Exhibit B you have no share in profits and losses whatsoever, do you?" She

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[4] LSC Ex. 1, p. 4 is the affidavit of the Louisiana Secretary of State indicating that LSC's Limited Partnership Agreement had been executed and acknowledged on March 17, 1983 and filed in the Secretary of State's office on March 28, 1983.

answered, "No, I don't." Tr. 102.

26. *Ms. Crochet's Business Experience.* Ms. Crochet conceded she had no significant experience in business management and that she has been a secretary for most of her professional career. Tr. 98-99. At hearing, she confirmed that she testified as follows at her deposition:[5]

> Q: What are your qualifications to be General Manager of a TV Station?
>
> A: I don't have any.
>
> Q: If your were putting up 85% of the investment in building this station, would you hire yourself as General Manager?
>
> A: Probably not.

At the hearing she stated that on reflection her selection as the proposed general manager seemed a reasonable one: Dr. Levatino knew her well; she shared his views on the needs of the community; and she was an honest person.

27. At the time of her deposition, Ms. Crochet was not aware of the extent of her personal liability for partnership losses. At the time of the hearing, she believed she was personally liable for the entire potential losses of the partnership. Tr. 103-04. Regarding her future financial obligations to LSC, Ms. Crochet testified that she was obligated to pay 15% of all expenses; for example, if the station cost $3 million to build, she would be responsible for $450,000. Tr. 102-103. As the following colloquy indicates, Dr. Levatino would be the source of the money.

> Q: Has Dr. Levatino agreed to loan you the money to make those payments?
>
> A: I don't recall.
>
> Q: You don't recall whether Dr. Levatino has agreed to loan you potentially several hundred thousand dollars?
>
> A: I am sure he has.

Tr. 103.[6]

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[5] The quoted passage is as it appears on page 19 of the transcript of Ms. Crochet's May 18, 1984 deposition. That passage was closely paraphrased at pp. 99-100 of the hearing transcript.

[6] Elsewhere in her testimony, it should be noted, Ms. Crochet conveyed the impression that building costs would be financed through a loan arranged between Dr. Levatino and a bank. Tr. 62-66; para. 19, *supra.*

28. Finally, Dr. Levatino has contacted principals from each of the other competing applicants to discuss settlement of the case. Ms. Crochet, on the other hand, has never contacted any of the other parties. Tr. 91, 94–95.

29. *Integration of Ownership*. LSC's integration proposal contemplates that Samuel R. Levatino, will not participate in the day to day management of the proposed facility. Kay Burns Crochet will serve as General Manager of the television station and will devote a minimum of 40 hours per week to her duties.

30. Under the proposal, Ms. Crochet will assume responsibility for supervision of all phases of station operation including overall supervision of the performance by all station employees in their assigned duties. All management level employees will report directly to her. Her duties will also include but not be limited to overseeing the continuing ascertainment of community needs and interests and formulating responsive programming to meet those needs and interests; formulating station policy; assuring station compliance with the Commission's Rules and Regulation; and effectuating the station's EEO program.

31. Ms. Crochet is presently employed as Personal Secretary to 19th Judicial District Court Judge Honorable Leo T. Higgenbotham, Jr. She assumed this position in 1979. Prior thereto she worked for approximately 10 years in various secretarial and clerical positions.

32. Ms. Crochet was born in Baton Rouge and is a lifetime resident of the community. She is actively involved in St. Alphonsus Catholic Church and School, being a member of the church and a member of the school association and athletic association for the school. Ms. Crochet has also participated in several political campaigns in the Baton Rouge area.

33. Ms. Crochet is in part of Hispanic descent; her grandmother Marie Cabellero Dugas was 100% Hispanic, her mother Margaret Dugas Burns, was 50% Hispanic. Thus, Ms. Crochet is one quarter Hispanic.

34. *Diversification*. Neither LSC nor its principals have any attributable ownership of, or interest in, any media of mass communication other than LSC.

Parish Family Television-Limited Partnership

35. *Ownership*. Parish Family Television-Limited Partnership is a limited partnership organized under the laws of the State of Louisiana. The General Partner of Parish is South Louisiana

Television, Inc. (SOLA), a Louisiana corporation. The officers, directors and shareholders of SOLA are Mary W. Burge (President, Director, and 40% shareholder), Anne G. Trufant (Vice President, Director, and 40% shareholder) and Mignon T. Gautreaux (Secretary-Treasurer, Director and 20% shareholder). Parish Ex. 1.

36. SOLA has a 50 percent equity interest in Parish. The remaining equity is held by two limited partners: John S. Baker, Jr., who holds a 30 percent interest; and Charles C. Gremillion, Jr., who holds a 20 percent interest.

37. Under Louisiana community property law, the spouse of each shareholder of SOLA, and of each of Parish's two limited partners, jointly own the interest of each named principal. In each instance, the named equity owner will exercise control over the equity interest and will make all decisions with respect to such interests.

38. *Integration of Ownership and Management.* Parish proposes to integrate each of the three principals of its general partner, SOLA, into full time management positions at the proposed station. Mary Burge will serve as full time Station Manager of the station should Parish's application be granted; Anne Trufant will serve as Director of Community Relations; and Mignon Gautreaux will serve as Assistant Program Director.

39. Mary Winona Burge is President, Director, and 40 percent shareholder of SOLA, the General Partner of Parish. If the Parish application is granted, Mrs. Burge will serve as Station Manager on a full-time (minimum 40 hours per week) basis. As Station Manager she will be involved in the supervision of all aspects of station operations. She will work with and assist the station's General Manager, overseeing all department heads and managers. She will be involved in employment decisions and will be responsible for ensuring compliance with FCC rules and policies. In coordination with the station's General Manager, Program Director, Assistant Program Director, and Director of Community Relations, Mrs. Burge will formulate programming policies and be involved in programming decisions.

40. Mrs. Burge resides in Hammond, Louisiana. Her home is within the Grade B contour proposed by Parish, about 35 miles from Baton Rouge. She has resided in Hammond since 1979 and

will continue to do so in the event of a grant.

41. Mary Burge has participated in the following civic activities in the service area proposed by Parish: member of the Southwood Academy Parent-Faculty Club in Hammond since 1979; member and deacon of the Church of Faith in Hammond, Louisiana; former (1979–1981) member of the First United Methodist Church of Pontchatoula. She has played an active role in each of these organizations. Parish Ex. 2.

42 Mrs. Burge is of Native American hertiage, her grandfather having been one-half Taos Pueblo Indian. She has visited Pueblo Taos, the ancestral home of the Taos Pueble tribe (Tr. 218), considers herself a Native American and believes people who know her regard her as such (Tr. 258). At Southwood Academy, she has appeared in classrooms to discuss Indian culture.

43. Mrs. Burge has never been employed at a broadcast station.

44. Anne Gremillion Trufant is Vice President, Director, and 40 percent voting shareholder of SOLA. If the Parish application is granted, Mrs. Trufant will be employed as Director of Community Relations of the station on a full-time basis. As Director of Community Relations, Mrs. Trufant will be responsible for fostering the station's involvement in community affairs, as well as community involvement and participation in station operations. Mrs. Trufant will serve as the station's spokesperson in the community, and will act as a conduit for community input into station programming. Based on discussions with community leaders and the general public, she will formulate and oversee the production of programming designed to respond to community needs and interests. Mrs. Trufant will supervise, station employees in the community relations department, the exact number of whom not yet having been determined (Tr. 140).

45. Anne Trufant has resided in Baton Rouge since 1980 and will continue to maintain her residence there should the Parish application be granted. She has participated in the following civic activities in Baton Rouge: a member of the Baton Rouge Chapter of the National Association of Social Workers;[7] the Kappa Delta Alum Association; Junior League of Baton Rouge; and a local Catholic Church, in which she is an active member. Mrs. Trufant presently devotes 40 or more hours per week to her activities as Executive Director of the Family Life Federation in Baton Rouge. She is paid for part of this time and contributes the remainder as a volunteer. She will resign her full-time position with Family Life

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[7] Mrs. Trufant holds a graduate degree in social work (Tr. 144).

Federation in the event the Parish application is granted, but plans to continue to participate in its activities as time is available Parish Ex. 3.

46. Anne Trufant has never been an employee of a broadcast station, but has participated from time to time in televised interview programs regarding the activities of the Family Life Federation.

47. Mignon T. Gautreaux is Secretary-Treasurer, Director, and 20 percent shareholder of SOLA. If the Parish application is granted, Mrs. Gautreaux will be employed full-time as Assistant Program Director. As Assistant Program Director, Mrs. Gautreaux will work with the Program Director, who has not yet been named, in establishing and supervising the programming department. Mrs. Gautreaux will formulate local programs and participate in the acquisition of syndicated programs. In addition she will supervise the editing staff to make sure movies and other programs meet station standards and practices; she will, along with the Program director, supervise news and public affairs programming; and she will be involved in all employment decisions affecting the programming staff. She will also perform other duties normally exercised by an Assistant Program Director at a television station. Parish Ex. 4; Tr. 210–212.

48. Mrs. Gautreaux lives in Baton Rouge and has resided there since 1952. Since 1979, she has participated in the following civic activities in Baton Rouge: Secretary of the Baton Rouge Community Concert Guild; President (1982–1984) and First Vice President (1980–1982) of the Baton Rouge Community Concert Guild; member, since 1980, of the Saint Joseph Academy Mother's Club in Baton Rouge; member of the St. Alyosius Home and School Association, and the St. Alyosius Adult Education Committee (1979–1980); member of Our Lady of Mercy Church in Baton Rouge; and a Pink Lady at Doctor's Memorial Hospital in Baton Rouge (1980–1981). Mrs. Gautreaux is currently involved in the activities of Mothers of Newborn Babies, providing help from time to time to new mothers who need assistance. Parish Ex. 4.

49. Parish makes no claim of past broadcast experience for Mignon Gautreaux.

50. It is contended that Mignon Gautreaux cannot be considered a true and actual owner of the applicant as she had made a capital contribution of only $10 in the applicant at the time of the hearing and because she was not knowledgeable about the applicant's affairs. The agreement under which Ms. Gautreaux purchased her stock obligates her to contribute future financing in

addition to the initial $10 contribution, a condition not specifically attached to other investors. Tr. 203. Ms. Trufant confirmed this arrangement. Ms. Trufant contributed a large intitial capital contribution ($5,000); Ms. Burge contributed a small capital contribution plus work on the application which has already been completed; and Ms. Gautreaux contributed a small captial contribution plus a pledge of future financing. Tr. 152. Ms. Gautreaux confirmed that she will make future financial contributions when necessary. Tr. 203. Therefore, it cannot be found that her stake in the application is limited to the $10 she has thus far contributed.

51. Similarly, Channel 44's argument that Ms. Gautreaux is insufficiently involved in partnership affairs to be credited as a true owner is not supported by the record. Though not the most knowledgeable of witnesses, her testimony as a whole indicates that she has been an active participant in the applicant. She has attended meetings of the Board of Directors and voted on the matters under discussion (Tr. 186-187, 191); she has taken minutes of the meetings (Tr. 189); she was aware the status of negotiations with a consultant (Tr. 192); and she was familiar with the program proposal (Tr. 211-212).

52. Both LSC and Channel 44 argue that Parish's integration proposal should be downgraded because its Board of Directors once passed a resolution to hire the consulting firm of Ditchfield, Watson & Williams to provide general management services to the proposed Parish station. The original resolution stated that the Ditchfield firm would provide "general management" services. It was "clarified" by a subsequent resolution which provided that the firm would be hired only to provide management consulting services in assisting the day-to-day managers, and would not actually run the station. The shareholders of Parish all testified that they had passed the resolution because they were not experienced in running a broadcast station and would initially need help from outside sources with such experience. Tr. 156, 188, 227-229. Mary Burge had met Mr. Ditchfield and knew that his firm was engaged in providing consulting services to television stations. Tr. 227. Thus, knowing that Parish would need consulting services, and knowing of this organization, the resolution was passed that the Ditchfield firm would be hired. *Id.* In fact, no contact with the firm regarding the Baton Rouge application or its possible employment was made at that time, nor has one been made since the adoption of the initial resolution. Tr. 155-156, 185, 226-227, 228.

53. *Diversification of Ownership of Media of Mass Communications*. Parish has no interests in any existing medium of mass communications nor does South Louisiana Television, Inc., Parish's General Partner. None of the officers, directors, or shareholders of SOLA, nor either of the Limited Partners of Parish, have any interest in any existing medium of mass communications.

54. Mary Burge is a 51 percent shareholder in Parish Family Television, Inc., an applicant for a new low power television station at Hammond, Lousiana. Her husband, Glen Burge, owns the remaining 49% of that applicant. In the event the application for Channel 44 is granted, Parish Family Television, Inc. will divest its interest in the Hammond low power station prior to commencement of program tests on Channel 44. Parish Ex. l.

55. Charles C. Gremillion, Jr., who holds a 30 percent limited partnership interest in Parish, is a 100 percent shareholder of Albert, Inc., an applicant for a new television station in New Orleans, Louisiana. Mr. Gremillion is committed to divest himself of his interest in Parish should the Albert, Inc. application be granted. Parish Ex. l.

Baton Rouge Channel 44, Limited Partnership

56. *Ownership*. Channel 44 is a Michigan limited partnership. The general partners are Linda Tallman and Brian Brady. Ms. Tallman owns 25% of the partnership; Mr. Brady, 15%. The limited partners are J. Clarke Nims, James Peterson and Thomas Peterson, each of whom owns 20% of the partnership.

57. Under Channel 44's Limited Partnership Agreement, the general partners have exclusive authority to manage and control the business and affairs of the partnership. The limited partners shall not participate in the management of control of the partnership's business nor shall they transact any business for the partnership or have the power to act for or by the partnership, such power being vested solely and exclusively in the general partners. Channel 44 Ex. l.

58. *Integration*. Linda Tallman will be Channel 44's full-time General Manager. Brian Brady will be channel 44's full-time General Sales Manager. Each will work at the station a minimum of 40 hours per week.

59. As General Manager, Ms. Tallman will be responsible for all areas of station management and will have overall supervisory responsibility for all station employees. As General Sales Man-

ager, Mr. Brady will coordinate and supervise all activities of the sales department and will be responsible for making sure the station's advertising policies are observed. Ms. Tallman and Mr. Brady will work together to establish and implement station policies and to coordinate programming and sales efforts. Both will participate in designing programming, particularly non-entertainment programming, responsive to the needs and interests of Baton Rouge and the Surrounding areas. Channel 44 Ex. 2, p. 3; Ex. 3, p. 3.

60. Ms. Tallman attended Western Michigan University in Kalamazoo, Michigan, and Jackson Community College, graduating from the latter institution in 1977. Since then, she has taken additional college courses, including Accounting, Small Business Management and Economics I and II, and Spanish.

61. Ms. Tallman has been in the broadcasting business since 1977. From April 1983 to November 1984, she was Business Manager of Chase Broadcasting Corporation, licensee of Stations WVGO (AM) and WKLJ(FM), St. Johns, Michigan. Her responsibilities with Chase included supervision of accounts payable, accounts receivable, payroll, budgets, traffic, billing, collections and cash management. From August 1982 to April 1983, Ms. Tallman was Business Manager of Station WILS(AM) and WILS-FM, Lansing, Michigan. Her duties included oversight of collections, traffic, accounts receivable and the billing process. From August 1981 to August 1982, Ms. Tallman was Traffic Manager for those stations. From September 1977 to August 1981, she worked at Stations WKHM and WJXQ(FM), Jackson, Michigan, as Traffic Director. Channel 44 Ex. 2.

62. Ms. Tallman resided in Jackson, Michigan at the time of the hearing. Prior the initiation of program tests by Channel 44, she will move to Baton Rouge and establish her permanent residence there.

63. Brian Brady was apparently the moving force in the application. He sought out Mr. Nims as a limited partner and the latter suggested bringing in the Petersons as additional limited partners. Tr. 285, 304, 356. Shortly before the application was filed Brady persuaded Ms. Tallman to join him as a general partner. Tr. 284. In 1981, Mr. Brady graduated from Ferris State College with a Bachelor of Science degree in advertising and marketing. In December of that year, he went to work as an advertising salesman for Stations WVGO(AM) and WKLH(FM), St. Johns, Michigan. From November 1982 to January 1984, Mr. Brady was National Sales Manager of Chase Broadcasting. His

primary responsibility was to develop regional and national advertising for Station KLKH(FM). From January to July 1984, he was General Sales Manager of Chase Broadcasting, supervising the station's local and national sales efforts. In July 1984, he was promoted to General Manager of the St. Johns stations. Prior to the initiation of program tests by Channel 44, he will leave his position with Chase Broadcasting and move to Baton Rouge to assume his duties at the Baton Rouge station. Mr. Brady presently resides in Lansing, Michigan. Channel 44 Ex. 3.

64. *Diversification*. Channel 44 holds no interests in any broadcast station or other outlet of mass communications. Moreover, neither of the general partners of Channel 44 owns any interest in a broadcast station or other outlet of mass communications. Thomas M. Peterson and James B. Peterson each hold 2.8% of the stock of Chase Broadcasting Corp., licensee of stations WVGO(AM) and WKLH(FM), St. Johns, Michigan. St. Johns is approximately 950 miles north of Baton Rouge. J. Clarke Nims and James M. Peterson are directors, but not officers or stockholders, of Benko Broadcasting Corporation, permittee of Station WLAJ-TV, Lansing, Michigan. Channel 44 Ex. 1, Tr. 341-42.

Comparative Coverage

65. A joint engineering exhibit was submitted by the parties relating to the areas and populations served by their proposed stations. The exhibit shows the following data (area in square miles in parenthesis):

Applicant	*Total Service*	*3rd Service*	*4th Service*	*5th Service*
LSC	1,606,308	11,938	9,322	43,401
	(11,072)	(262)	(323)	(578)
Parish[8]	1,451,753	0	7,495	25,256
	(9,421)	(0)	(274)	(548)
Channel 44	1,016,257	20,580	11,257	21,258
	(9,001)	(436)	(100)	(361)

Conclusions

66. With the prehearing resolution of the qualifying issues specified in the HDO, only the standard comparative issue

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[8] The areas and populations shown for Parish are based on its post-designation amendment of March 23, 1984. *See Santee-Cooper Broadcasting Co. of Hilton Head, Inc.*, 57 RR 2d 662, 680-681 (Rev. Bd. 1984). The presiding officer had previously ruled that "any coverage advantage which might result [from the amendment] will not be credited." FCC 84M-2467, released May 30, 1984. It is evident from a comparison of the pre-designation and post-designation propos

remains to be decided. In the context of this case, the relevant questions under that issue are diversification of ownership in mass media of communications, comparative coverage and integration of ownership with management.

Diversification

67. The diversification criterion is of little consequence in weighing the comparative qualifications of the applicants in this case. LSC and Parish have no attributable media interests. The interests attributable to Channel 44 are both minute and distant. Specifically, Thomas Peterson and James Peterson, 20% limited partners in Channel 44, each own 2.8% of an AM/FM combination in St. Johns, Michigan, while J. Clarke Nims, another 20% limited partner of Channel 44, and James Peterson are directors (but not officers or stockholders) of a television permittee in Lansing, Michigan. These interests are *de minimis* and do not support the assessment of any diversification demerit against Channel 44, especially in view of the passive role these individual have in the applicant. *See Cascade Video of Oregon, Ltd.*, 56 RR 2d 452 (Rev. Bd. 1984); *Cleveland Television Corp.*, 91 FCC 2d 1129, 1138-39 (Rev. Bd. 1982), *rev. denied*, FCC 83-235 (released May 19, 1983), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984).

Comparative Coverage

68. LSC would provide service to more people than either Parish or Channel 44. See Findings, para. 65. In the case of Parish the population figures are: 1,606,308 for LSC and 1,451,753 for Parish, a difference of 154,555. With respect to Channel 44 the margin is greater: 1,606,308 for LSC and 1,016,257 for Channel 44, a sizeable difference of 590,051 people. As between Parish and Channel 44 the difference is 435,496 in favor of Parish. Thus in terms of overall coverage LSC enjoys a slight advantage over Parish, while both serve a significantly greater number of people than Channel 44.

69. None of the applicants would provide a service to white or grey areas. Channel 44 would, however, provide a third service to 20,580 people, a fourth service to 11,257 and a fifth to 21,258.

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als (Joint Ex. 1, Figures 8 and 9) that the amendment confers no advantage; rather Parish loses more than 500,000 in population and no longer offers service to areas with two or less existing services. (Its amendment was necessitated in order to comply with minimum mileage separation requirements).

LSC's figures are roughly comparable: 11,938; 9,322; and 43,401. Parish brings no third service but would provide a fourth service to 7,495 and a fifth service to 25,256. Thus, in terms of providing service to underserved areas Channel 44's proposal is deemed slightly superior to LSC's primarily because its third service advantage is more significant than LSC's fifth service advantage. Both proposals are superior to Parish's since the latter's failure to provide a third service is not offset by any clear superiority with respect to a fourth or fifth service.

70. On balance, the presiding officer concludes that LSC is entitled to a slight preference in terms of comparative coverage. The substantially greater population LSC would serve vis-a-vis Channel 44 is sufficient to overcome the latters' slim advantage in providing service to underserve areas; and LSC is at least marginally superior to Parish on both counts. As between Parish and Channel 44, the latter's stronger showing on service to underserved areas is sufficient to comensate for Parish's considerable advantage in total pouplation served. These applicants are considered equal to one another and slightly below LSC.

Integration of Ownership with Management

71. This case comes in the wake of *KIST Corp.* 57 RR 2d 49 (Rev. Bd. 1984) in which the Review Board rejected the integration claim of a purported 95% stockholder where the facts demonstrated that the nominal 5% stockholder was actually in control. In this case all of the applicants are limited partnerships rather than corporations, but Parish and Channel 44 rely heavily on *KIST Corp.* and its predecessors, *Berryville Broadcasting Co.*[9] and *Henderson Broadcasting Co., Inc*,[10] to disparage each others' integration proposal and, more particularly, that of their common opponent LSC.

72. In *KIST Corp.* the Board drew the following distinction between that case and limited partnership arrangements exemplified by a proposal under consideration in the recently decided *San Joaquin Television Improvement Corp.*:[11]

> San Joaquin is completely inapposite. There the question was whether a "limited" partnership agreement allocating 45% of the equity of the applicant to the "limited" partners (who provided capital but no other future services and who sought no integration credit) and 55% to the

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[9] 70 FCC 2d 1 (Rev. Bd. 1978).

[10] 63 FCC 2d 419 (Rev. Bd. 1977).

[11] 96 FCC 2d 594 (Rev. Bd. 1983).

> "general" partners (who provided no capital but would fully manage the station) was cognizable for ownership integration purposes. The Board there found that the "limited" partnership agreement conformed in all respects to the Uniform Limited Partnership Act and representated a bona fide business arrangement. See 54 RR 2d at 1210-1211. Under the holding of Anax Broadcasting, Inc., 87 FCC 2d 483, 487-488 (1981), the integration of the "general" partners was credited. But, in San Joaquin, there was no strained attempt by the "limited" partnership principals to structure the ownership so as to garner enhanced integration credit for minority and/or female ownership. (Footnotes omitted).

73. In this case the applications of Channel 44 and Parish do not differ markedly from the proposals in *San Joaquin* and other cases where limited partnership agreements have been routinely accepted at face value. The general partners have a substantial equity interest — 50% in the case Parish and 40% for Channel 44 — and there is nothing but unsupported speculation to suggest that the limited partners will be other than passive investors. It cannot be denied that each proposal permits the applicants to claim certain advantages under the integration criterion, but there is nothing in the arrangements so strained or contrived as to warrant disbelief in their underlying credibility of bona fides. However, in the case of LSC the evidence of record justifies a more rigorous scrutiny of its proposal, and in the presiding officer's view a persuasive case has been made that the application is a sham and that the 100% integration claimed by the applicant cannot be credited.

74. *LSC*. Nominally, Kay Crochet holds a 15% ownership interest and is the sole general partner of LSC. As general partner, she supposedly has complete control over the management of LSC's affairs. But the evidence demonstrates that the nominal limited partner, Samuel R. Levatino, is actually in charge. To briefly summarize the findings set forth in paras. 9-28, supra, Dr. Levatino petitioned to have the channel allocated to Baton Rouge, retained the consultant (Sterling Communications) to prepare the application, secured the transmitter sites,[12] arranged for the station's financing, unilaterally entered into an agreement regarding the station's equipment, paid all expenses in connection with the preparation and prosecution of the application until May 1984, made the decision to hire LSC's legal counsel and has acted as the applicant's spokesperson in settlement discussions. Moreover, Dr. Levatino's address, not Ms. Crochet's, is

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[12] LSC's second transmitter site was secured well after execution of LSC's Limited Partnership Agreement, which purportedly invested in Ms. Crochet all authority to bind the partnership.

listed in the Limited Partnership Agreement as LSC's principal office.

75. LSC suggests that there is nothing "wrong" or extraordinary in any one of these activities or circumstances, but when viewed in their totality, Dr. Levatino's purported role as a mere passive investor becomes highly suspect. Other facts of record reenforce this belief. Dr. Levatino is an experienced businessman. Among other interests, he is Chairman of the Board and the largest stockholder of a local bank. Ms. Crochet, in contrast, has no previous business experience. For most of her professional career she has been a secretary or typist/clerk. She did not prepare a budget or financial plan for the proposed station and has never seen documents estimating the station's construction costs. She does not even know if she is to be paid a salary as LSC's General Manager. She testified that the decision whether she would receive a salary (and if so, how much) probably would be based on what LSC's counsel and consultants feel is "best for the station." Finally Ms. Crochet is apparently obligated to pay 15% of the station's expenses. She initially testified that she could not recall whether Dr. Levatino had agreed to lend her money for construction expenses, but on further cross-examination conceded that she is sure he has. On the other hand, elsewhere in her testimony, she stated that Dr. Levatino had arranged for a bank loan for the funding of construction and operation of the station. In sum her testimony regarding matters that are basic to the application betrays a lack of knowledge that is not consistent with the role of the general partner in a substantial enterprise like the one being proposed by LSC.

76. In view of the foregoing, the representation that Ms. Crochet has exclusive authority to manage and control the partnership business and the operation of the station while Dr. Levatino plays a passive non-participating role simply defies belief. In this respect LSC's application is a paper proposal, crafted by the "limited" partner to "garner enhanced integration credit," but fundamentally bereft of credibility. Its claim of 100% ownership integration based on the participation of Ms. Crochet must therefore be heavily discounted. The presiding officer is willing to accept the contention that Ms. Crochet will work full-time at the station in a cognizable managerial capacity and will therefore credit LSC with the amount of ownership-management integration that corresponds to her proposed equity interest in the enterprise i.e. 15 percent.

77. *Parish.* The applicant's general partner is South Louisiana Television, Inc. whose stockholders are Mary W. Burge (40%), Anne G. Trufant (40%) and Mignon Gautreaux (20%).[13] Each proposes to work full time on station affairs if the Parish application is granted, Burge as Station Manger, Trufant as Director of Community Relations and Gautreaux as Assistant Program Director.

78. Ostensibly, Parish is entitled to 100% full-time integration, a conclusion that is challenged by the other applicants. Primarily, it is contended that Parish will hire consultants to assist in the operation of the station and that this vitiates its integration proposal. It is quite clearly the belief of Parish's principals that, being inexperienced broadcasters, they will need assistance in operating an enterprise of this magnitude. An experienced General Manager will be hired and, in addition, consideration has been given to hiring a consulting firm to provide information and advice on staffing and programming. However, nothing in the record establishes or even suggests that these plans would interfere with or be substituted for the integration proposals set forth above. Rather, they show a commendable awareness that neophytes in the broadcast field can benefit from the advice and assistance of those with greater knowledge and experience.

79. In addition it is argued that Mignon Gautreaux's integration should not be credited because her proposed position as Assistant Program Director is not a true managerial position. Although the Policy Statement[14] does not make reference to such a position, the posts it cites as being cognizable seem illustrative ("such as") rather than all inclusive. The test is the extent of the individuals' "policy functions and the likelihood of their playing important roles in management." Ms. Gautreaux's specified duties (para 47, supra) involve managerial and policy-making functions, and it is reasonable to believe that her influence will be buttressed by her position as an officer, director and sizeable shareholder in the managing general partner. Her integration, therefore, must be considered, and accordingly Parish will be credited with 100% ownership integration.

80. *Channel 44.* This applicant is likewise credited with 100% integration. Both general partners will be employed full time at

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[13] As general partner, the corporation has a 50% interest in the Parish limited partnership.

[14] *Policy Statement on Comparative broadcast Hearings*, 1 FCC 2d 393, 395 (1965).

the proposed station, Ms. Tallman as General Manager and Mr. Brady as Sales Manager.

81. *Enhancement Factors*. LSC has been credited with only 15% integration and both Parish and Channel 44 have 100%; this discussion will therefore include only the latter two applicants, since any qualitative advantage which might acrue to LSC cannot compensate for the overwhelming quantitative superiority of Parish and Channel 44.

82. All three voting principals of Parish reside within the service are of the proposed station, Anne Trufant and Mignon Gautreaux in Baton Rouge itself and Mary Burge in Hammond, Louisiana, about 35 miles from the city of licensee. All three have been active in civic affairs and are, of course, females. Mary Burge is also entitled to credit as a member of a minority group recognized by the Commission's minority ownership policy.[15] None of the three has broadcast experience.

83. With respect to Channel 44, both Ms. Tallman and Brian Brady have broadcast experience, each having worked at radio stations in Michigan, Tallman since 1977 and Brady since late 1981. Each proposes to move to Baton Rouge in the event of a grant, but neither claims a record of civic participation. An additional enhancement factor is Ms. Tallman's gender.

84. In view of the foregoing comparison Parish is awarded a preference for local ownership in view of the long standing local residence of its principals as compared with Channel 44's entirely prospective local residence; it is the preferred applicant in terms of civic participation; it is preferred for its 100% female ownership; and it is entitled to a minority preference in view of the Indian identification of Mary Burge, a 40% owner of Parish's general partner. Channel 44 receives a preference for its broadcast experience.

85. Enhancement factors in effect constitute the "tie breaker" between the two applicants since quantitatively they are in parity. The presiding officer concludes that on the basis of these factors Parish is entitled to an integration preference. It has been

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[15] *OMB Directive 15*, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting," which is relied on by the Commission in establishing who is considered a minority, states that, to qualify as an American Indian a person must meet two tests. First, the person must have his or her origins in the original peoples of North America. Second, the person must maintain cultural identification through tribal affiliation or community recognition. Ms. Burge meets both tests. Her grandfather was one-half Pueblo Indian, thus she has origins in the original peoples of North America. She maintains cultural identification through community recognition, lecturing at a local school on Indian culture.

preferred in more areas than Channel 44, and the latter's greater broadcast experience has been traditionally regarded as a matter of "minor significance."[16] This preference is not sufficient to equal or surpass Parish's multiple preferences enumerated above.

Summation

86. The applicants have been rated equal under the diversification criterion. LSC has received a slight preference for comparative coverage but ranks far behind the other applicants in terms of ownership integration with management. Parish has received a preference for integration, strong in comparison with LSC and slight vis-a-vis Channel 44 (since only enhancement factors separate the two), while both are ranked equal in comparative coverage. It is therefore concluded that the public interest would be better served by a grant of the Parish application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Parish Family Television-Limited Partnership IS GRANTED and the applications of Louisiana Super Communications, Limited Partnership and Baton Rouge Channel 44, Limited Partnership ARE DENIED.[17]

FEDERAL COMMUNICATIONSW COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

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[16] *Policy Statement, supra* at 396.

[17] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Alien
Alien, Control
Alien, Ownership
Citizenship Requirements
Cut-off Rules

Assignment applications filed by alien were properly accepted for filing, since patent defect was noted and subsequently corrected: assignment applications not subject to competitive applicants and cut-off dates.
— *Metromedia Radio & TV*

FCC 85-606

Multiple Ownership
Ownership
Newspaper Ownership

Daily newspaper owner permitted to acquire television station located in same market as newspaper on condition that newspaper interest be divested within 24 months of consummation of television acquisition.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

Metromedia Radio & Television, Inc. (Assignor)	BALCT-850624KL BALCT-850624KR BALCT-850624KM
to	BALCT-850624KN BALCT-850624KO BALCT-850624KP
News America Television Incorporated (Assignee)	

For Assignment of Licenses for Television
Stations WNEW-TV and W64AA
(translator), New York, New York;
KTTV, Los Angeles, California;
KRLD-TV, Dallas, Texas; KRIV-TV,
Houston, Texas; and WTTG, Washington,
D.C.

WFLD Television, Inc.
(Assignor)

to BALCT-850624KQ

News America Television Incorporated
(Assignee)

For Assignment of License for Television
Station WFLD-TV, Chicago, Illinois

Metromedia Radio & Television, Inc.
(Assignor)

to BALCT-850624KK[1]

The Hearst Corporation (Assignee)

For Assignment of License for Television
Staton WCVB-TV, Boston,
Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: November 14, 1985; Released: November 27, 1985

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-noted applications assigning the licenses of the television

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[1] All the stations being assigned here are either licensed to or controlled by Metromedia Radio & Television, Inc. News America Television Incorporated it

stations presently controlled by Metromedia Radio & Television, Inc. (Metromedia) to News America Television Incorporated (News America) and to Te Hearst Corporation (Hearst); (b) a petition to deny, jointly filed by Sue Gottfried, individually and on behalf of a class of deaf and hearing impaired individuals (Gottfried), and by Stanley Fleishman, on behalf of the California Association of the Physically Handicapped, Inc., Patty Ann Berkosky, individually and representing a class of physically handicapped persons, and the Law Institute for the Disabled and Elderly at Southwestern University School of Law (Fleishman); (c) a petition to deny filed by the National Coalition on Television Violence (NCTV); (d) a petition to deny filed by the Media Access Project, on behalf of Tlecommunications Research and Action Center, Black Citizens for Fair Media, Health and Medicine Policy Research Group, New York Public Interest Research Group, Charles Benton, Msgr. John Egan, Jane Ramsey and Kale Williams (MAP); (e) a petition to deny filed by the Washington Association for Television and Children (WATCH); (f) a petition to deny filed by Metrowest Corporation, licensee of station WPWR-TV, Aurora, Illinois (Metrowest); (g) a motion to waive compliance with court order and a petition to deny filed by Anthony R. Martin-Trigona (Martin-Trigona); (h) responsive and supplemental pleadings; and (i) a request for issuance of tax certificates filed by Metromedia; and (j) pleadings related to the tax certificates.[2]

2. K. Rupert Murdoch (Murdoch) controls News America, which is structured as follows: News America is a domestic corporation which is owned (100%) by Twentieth Holdings Corporation, also a

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is not acquiring WCVB-TV. That station is being assigned to The Hearst Corporation. Should the sale of WCVB-TV fall through, News America Television Incorporated will have an opportunity to acquire the station.

[2] As a preliminary matter, except for Martin-Trigona, we have determined that the petitioners mentioned above have standing in this matter. *See F.C.C. v. Sanders Bros. Radio*, 309 U. S. 470 (1940), and *United Church of Christ v. F.C.C.*, 359 F.2d 994 (D. C. Cir., 1966). We note that Martin-Trigona is presently under an injunction issued by the Federal District Court for the District of Connecticut barring him from initiating any litigation in any federal forum without first obtaining leave of that forum by filing a motion entitled "Application Pursuant to Court Order Seeking Leave to File," together with certain required attached exhibits. *In re Anthony R. Martin-Trigona*, 592 F.Supp. 1566, 1571-72 (D. Conn. 1984), *aff'd*, 763 F.2d 140 (2nd Cir., 1985). Martin-Trigona has not complied with the requirements imposed by the Court, and his motion to waive a court imposed injunction is outside our jurisdiction. The motion is, therefore, dismissed. However, his allegations have been raised by other petitioners, and to that extent his petition will be considered.

domestic corporation. Twentieth Holdings Corporation has two classes of voting stock: preferred, which controls 76% of the corporation, and common, which controls 24% of the corporation. Murdoch owns all of the preferred stock. The common stock is owned by News Group Publications, Inc., a domestic corporation, which in turn is owned (100%) by News America Holdings Incorporated, also a domestic corporation. News America Holdings Incorporated is owned (100%) by The News Corporation Limited, a publicly traded Australian corporation, of which 46 percent of the voting stock is owned by Cruden Investments Pty. Ltd., which is controlled by and for the benefit of the Murdoch family. The remaining 54 percent is held by individuals who are not related to Murdoch and none of whom hold more than 5 percent of the issued and outstanding stock of The News Corporation Limited.

3. Presently, Murdoch controls *The New York Post* and *The Chicago Sun-Times*, both daily newspapers located in New York City and Chicago, respectively. Since the Grade A contours of stations WFLD-TV, Chicago and WNEW-TV, New York encompass, individually, the communities where these daily newspapers are published, acquisition of stations WFLD-TV and WNEW-TV is prohibited by Section 73.3555(c)(3) of the Commission's Rules. Murdoch has requested that he be allowed a period of two years from the date of grant of these applications to achieve compliance with the Commission's cross-ownership rules. Murdoch, through the affidavit of Stanley S. Shuman, a director of The News Corporation Limited has stated that, while preparation of sale memoranda and identification of prospective buyers of the newspapers have begun, it is not desirable to approach these buyers or make any financial presentation until after the subject applications have been approved by the Commission, since the sale of the newspapers is contingent on the acquisition of the television stations. Further, Mr. Shuman states that the two-year period is necessary because of difficulty in selling print media, in general, and because neither paper is dominant in its own market. Additionally, Mr. Shuman asserts that a two-year period would allow a reasonable period within which to make presentations and to negotiate the best possible terms for sale.

Petition to Deny filed by Gottfried and Fleishman

4. In their joint petition, which is directed at television station KTTV, Los Angeles, California, Gottfried and Fleishman charge

that Metromedia, in its operation of KTTV, has failed to make a reasonable effort to serve deaf and hearing impaired viewers by captioning its programming and has failed to take affirmative action to hire and advance in employment qualified handicapped persons, citing Sections 503 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 793 and 794) and Section 309(d) of the Communications Act of 1934, as amended (47 U.S.C. § 309(d). They also contend that Murdoch has made no commitment to improve Metromedia's past performance.[3]

5. Gottfried and Fleishman also assert that Metromedia has not met the high standard of candor and forthrightness required of licensees, citing *WHW Enterprises, Inc. v. F.C.C.*, 753 F.2d 1132 (D.C. Cir. 1985) and *F.C.C. v. Sanders Bros. Radio*, above. Gottfried and Fleishman assert that while the Commission is not usually concerned with a licensee's financial arrangements, the Commission is interested when the financial arrangements detract from a licensee's ability to live up to its responsibility as a public trustee. *See F.C.C. v. Sanders Bros. Radio*, above, and *Carroll Broadcasting Co. v. F.C.C.*, 258 F.2d 440 (D.C. Cir., 1958). They claim that, by permitting a leveraged buyout of its stock by John Kluge, Metromedia allowed a substantial amount of debt to be incurred and this has made it impossible for KTTV to fulfill its obligations in serving the public and has dictated the need to sell the station. They contend that a hearing is necessary to determine whether Metromedia has been completely forthcoming with the Commission.

6. With respect to their concerns that Metromedia has shown a lack of candor by not disclosing the impact that the "leveraged buyout" would have on it, no party has submitted any evidence nor do we find any evidence to support this allegation. When the "leveraged buy-out" was effectuated, it was accomplished by the use of FCC Form 316, the short-form application. *Metromedia, Inc.*, 98 FCC2d 300, *recon. denied*, 56 RR2d 1198 (1984), *appeal filed sub nom. California Association of the Physically Handicapped, Inc. v. F.C.C.*, No. 84-1170 (D.C. Cir., 1984). That application form, as previously modified by the Commission, no longer requires any specific financial information with regard to either an assignee or transferee of the station(s) in question. *See*

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[3] These are the same legal arguments previously presented to and rejected by the Commission and the courts. *See Golden West Associates, L. P.*, FCC 85-541 (released October 11, 1985). As stated in *Golden West Associates, L. P.*, at paragraph 8, we will reject these arguments summarily and without comment. *See also John Cervase*, 54 FCC 2d 1039 (1975).

Public Notice, FCC 82-557 (released December 13, 1982). Therefore, neither Metromedia nor John Kluge was required to make any financial showing beyond a certification. And, it should be noted, no such issue was either raised or discussed when the "leveraged buy-out" was considered by the Commission. *Metromedia, Inc.*, above. Further, the fact that the transaction involved a leveraged buy-out does not expand the buyer's obligations with respect to its financial certification; that is, that it has sufficient assets to consummate the transaction and operate the stations for three months. The situation set forth in *WHW Enterprises, Inc. v. F.C.C.*, above, is not applicable because in that case the applicant deliberately misrepresented facts necessary for the Commission to fulfill its statutory mandate. Accordingly, these petitioners have failed to raise a substantial and material question to the assignor's qualifications. Moreover, to the extent Gottfried and Fleishman infer that the public has not been served, they have submitted in information demonstrating that Metromedia has not fulfilled its programming obligations, either as expressed in our policy set forth in *Ascertainment of Community Problems*, 57 FCC2d 418, 445 (1976), or as modified by *Commercial TV Stations (Television Deregulation)*, 98 FCC2d 1076 (1984).

Petitions to Deny Filed by NCTV, MAP, WATCH, and Metrowest

7. The petitions to deny filed by NCTV, MAP, WATCH, and Metrowest are solely concerned with Murdoch's acquisition of the Metromedia stations and raise essentially the same arguments. The petitioners raise no objections with respect to The Hearst Corporation's acquisition of WCVB-TV in Boston. Since the objections presented by the petitioners are essentially the same, we shall not treat the petitions separately. The contentions raised are:

> (a) Since Murdoch was not a United States citizen at the time of the filing of the subject applications, the applications should not have been accepted for filing.
>
> (b) Murdoch has shown a lack of candor by failing to inform the Commission of his intention to alter the programming, its content and format, at the stations he is seeking to acquire.
>
> (c) The public interest will not be served by a grant of these applications to Murdoch because he will increase the amount of televised violent entertainment programming and reduce the amount of children's programming now being broadcast.

(d) Common ownership of daily newspapers and television stations located in the same community is prohibited by Section 73.3555 of the Commission's Rules and nothing has been advanced to support the need for a two-year waiver of the rule.

(e) Murdoch's financial certification is not sufficient.[4]

8. In support of the first argument as to Murdoch's citizenship, petitioners rely on Section 310(b) of the Communications Act and Section 73.3566 of the Commission's Rules. Further, while noting that the Commission has on occasion accepted applications where the applicant has not demonstrated certain requisite qualifications for an ultimate grant of the application, citing *KALE, Inc.*, 56 FCC2d 1033, 1034 (1975), they maintain that the nature of such deficiencies — financial, engineering, and/or character qualifications — are usually subjective characteristics open to Commission interpretation and investigation. Moreover, they contend that there is a difference between substantially complete and patently defective applications and that since the applications were patently defective they should have been dismissed. *See e. g. South Carolina Educational Television Commission*, 80 FCC2d 390 (1980) and *Oro Broadcasting System*, mimeo 3092 (MMB March 23, 1983).

9. In its opposition, while it notes that defective applications can be accepted for filing if accompanied by an appropriate waiver (Section 73.3566 of the Commission's Rules), News America states that it knew that a waiver of Section 310(b) of the Communications Act was inappropriate. Thus, it did not ask for a waiver but, instead, represented in the applications that Murdoch would perfect a change in his citizenship prior to the time the Commission acted on the applications. In support of its position, News America cites *James River Broadcasting Corporation v. F.C.C.*, 399 F.2d 581 (D.C. Cir. 1968), for the proposition that applications cannot be dismissed on account of "formal" flaws if the flaw can be corrected before Commission action on the application. *See also Midcom Corporation*, 63 FCC2d 257, 259-60 (1977).

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[4] MAP has requested an oral hearing prior to Commission action on these applications. It notes press accounts of Murdoch's plans to consider creating a network in the future. MAP refers to previous Commission actions taken in connection with previous proposed sales that included national television networks. The short answer to MAP's request is that we do not here consider a transaction that involves in part the sale of a television network. The applicant's nascent plans to engage in network operations provide an insufficient basis for departing from our normal course of considering contested assignment proceedings on the basis of the pleadings submitted.

10. Murdoch is a citizen of the United States. We note that when the subject applications were tendered for filing on June 24, 1985, News America, in Exhibit 1 to its applications, stated that, "with the exception of K. Rupert Murdoch, now an Australian citizen living in New York City, who has applied to the Immigration and Naturalization Service to become a United States citizen, all of its officers and directors are United States citizens. It is expected that, in the normal course, Mr. Murdoch will become a citizen within the next several months and, in any event, prior to the closing of the assignment of licenses." Except for the fact concerning Murdoch's citizenship, we determined that the applications were complete and, in view of the statement that the citizenship question would be corrected, the applications were accepted for filing on July 5, 1985.

11. In view of the statement put forward in the applications, which indicates that the patent defect would be corrected, we find nothing in our rules or in any case decisions requiring that such assignment applications must be promptly dismissed. In that regard, Section 73.3566 of our rules provides that patently defective applications, unless accompanied with a request for waiver, will not be accepted for filing. We consider News America's statements as to Murdoch's pending citizenship petition to be a request for waiver of the acceptance standards. Section 73.3522 permits amendment of an application, as a matter of right, at any time prior to the adoption of a hearing designation order. Thus, even assuming that this were a patent defect, we believe that an assignment or transfer application does not have to be dismissed upon the first observation of such a defect. In addition, Section 310(b) of the Communications Act states that "no broadcast . . . license shall be granted to or held by — (1) any alien . . . ." The section does not prohibit the filing of any application by an alien who is in the process of becoming a United States citizen.

12. Moreover, the cases relied upon by the petitioners and News America are not analogous to the present situation because in those cases the patent defects were contained in mutually exclusive applications for authorizations, which were subject to cut-off dates. To protect the rights of all such applicants, applications that are patently defective cannot be accepted for filing. Here there is no competition and no cut-off dates, other than a 30-day period applicable to the filing of formal protests. *See* Section 309(d)(1) and 310(d) of the Communications Act. Since

the applicant informed the Commission of the defect and stated that it was in the process of being corrected, and since Murdoch became a United States citizen on September 4, 1985, and an amendment correcting the defect was subsequently filed, we believe that the subject assignment applications were properly accepted for filing.

13. Next, we turn to the allegation concerning Murdoch's lack of candor by his alleged failure to disclose his intention to alter the present programming of the subject stations. According to the petitioners, a grant of these applications will not be in the public interest because there will be an increase in the amount of violent entertainment programming and a reduction in the amount of children's programming. These allegations were premised on studies of three of Murdoch's newspapers in the United States (*The Chicago Sun-Times, The New York Post* and *San Antonio News*) and his television programming in Australia and Europe. The petitioners determined that, since Murdoch took over these newspapers, news reporting has become "sensationalistic" with a tremendous increase in the coverage of rape and violence. With regard to Murdoch's programming in Australia and Europe, the petitioners, relying on trade publications, argue that Murdoch broadcasts large amounts of violent entertainment, much larger than the majority of other European channels that were studied. The petitioners conclude that it is quite clear that Murdoch will use "sensationalistic" violence as a way of maximizing profits with little regard to the public interest. Moreover, because of the high cost of acquisition of the subject stations and the assumption of debt involved in this transaction, the petitioners believe that there will be a significant reduction in the presentation of children's programming and that the programming offered will not be in the public interest. In that regard, the petitioners assert that children's programming has achieved recognition as programming deserving particular attention by broadcast licensees. *See Action for Children's Television,* 50 FCC2d 1, 11–14 and 15 n. 15 (1974), *recon. denied,* 55 FCC2d 691 (1975), *aff'd sub nom. Action for Children's Television v. F.C.C.,* 564 F.2d 458 (D.C. Cir., 1977), and *TV Programming for Children,* 96 FCC2d 634, 655 (1984), *aff'd sub nom. Action for Children's Television v. F.C.C.,* 756 F.2d 899 (D.C. Cir., 1985).

14. In response, News America states that its representations are in accord with Commission requirements and that no further detail ought to be required. News America maintains that while the representations are not extensively detailed, they are, how-

ever, entirely consistent with the Commission's deregulatory orders regarding commercial broadcast applicants, citing *Commercial TV Stations (Television Deregulation),* 98 FCC2d 1076 (1984). Murdoch notes the Commission stated that "a more expansive and fully detailed recitation of an applicant's current assessment of the program mix responsive to public interests and needs could have an effect precisely contrary to the Commission's intent in flexibility to accommodate 'the natural economic incentives of the developing video marketplace.'" *Id.* at 1092. News America further maintains that even if the applications were to be considered under pre-television deregulation content standards, the petitioners' arguments are without merit and "carry with them implications that are constitutionally suspect," citing Section 326 of the Communications Act of 1934, as amended, and *F.C.C. v. WNCN Listeners Guild,* 450 U.S. 582, 597 (1981). *See also Action for Children's Television,* and *TV Programming for Children,* above.

15. From the foregoing, it does not appear Murdoch has shown any lack of candor or that he will not respond to the needs and interests of the communities to which the subject stations are licensed. Indeed, in the applications, News America stated its familiarity with the current operations of the stations to be acquired and represented its present general intention "to continue those operations and attempt to expand and improve upon their performance in light of community needs . . . ." However, that expression of intent need not be relied upon here. As set forth in *Commercial TV Stations (Television Deregulation),* above, there are no requirements that an applicant make any representations concerning its proposed entertainment programming.

16. With regard to the petitioner's conclusions drawn from Murdoch's operation of newspapers located in the United States and his programming aired in Europe, we do not believe that they are material or relevant to a grant of these applications. Section 326 of the Communications Act provides that "nothing in this Act shall be understood or construed to give the Commission the power of censorship . . . ." Thus, a licensee has editorial control of programming and the Commission cannot direct a broadcaster on how its station shall be programmed. *See F.C.C. v. Midwest Video Corp.,* 440 U.S. 689, 705 (1979). Broadcasting is also a medium entitled to First Amendment protection. *See United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).*

17. With regard to the subject of children's television, we recently stated that we would not apply a "national mandatory quota system for children's programming. But there is a continuing duty, under the public interest standard, imposed on each licensee to examine the program needs of the child as part of the audience and to be ready to demonstrate at renewal time its attention to those needs." Further, "a licensee may consider what other children's program service is available in its market in executing its response to those needs." *See TV Programming for Children,* 96 FCC2d at 656.

18. In responding to Congressional directives on the subject of televised violence and obscenity, the Commission declined to impose any limitation on the broadcast of violent programming. Our decision was based on the constraints placed on the Commission by the Constitution, Section 326 of the Communications Act and the lack of an objective standard to measure the programming against. Furthermore, we determined that any rule making would require an appropriate balance between the need to protect and the interest in diverse programming, the end result of which could run the risk of thwarting creative developments in the medium. Instead, a meaningful self-regulatory reform on the part of the television industry was sought. *See Broadcast of Violent, Indecent and Obscene Material,* 51 FCC2d 418, 420 (1975). To the extent that petitioners raise an issue as to news distortion, we have stated that we will not attempt to evaluate the news judgment of a broadcaster in the absence of extrinsic evidence of an intentional news fabrication or distortion. *See CBS Program "Hunger in America,"* 20 FCC2d143, 150-51 (1969). Petitioners have submitted no such extrinsic evidence here, so there is no basis for inferring that News America will engage in news distortion in connection with the operations of the stations to be acquired.

19. In view of the foregoing, we do not find that News America has shown any lack of candor concerning its proposed programming at the subject stations or that it will not comply with our policy statements concerning children's programming. With regard to the allegations concerning violent programming and the possibility of its broadcast, Commission judgments in this area must be made against the background of Section 326 of the Act and the First Amendment, as well as the pleadings before it. The burden is upon the petitioners to make a showing, on its face, that a grant of these applications would be inconsistent with the

public interest; before the Commission is obliged to conduct further inquiry, it must have well pleaded allegations before it. *See Bilingual Bicultural Coalition v. F.C.C.,* 595 F.2d 621, 629-30 (1978) (*en banc*). The petitioners have not met this burden and have, instead, relied on speculation and conjecture. Therefore, no further inquiry on this matter is warranted.

20. Next we turn to the request that divestiture of the daily newspapers in New York City and Chicago be permitted within two years from the date the Commission approves the subject applications. The petitioners assert that Section 73.3555(c)(3) of the Commission's Rules prohibits a daily newspaper owner from acquiring a license for a co-located television station. They further state that waiver of the divestiture requirement would be permitted under these circumstances: (1) inability to sell the station or newspaper or where the sale is only possible at artificially depresssed prices; (2) the separate ownership and operation of the newspaper and station cannot be supported in the locality; and (3) where it could be shown for whatever reason that the purpose of the rule would be disserved by divestiture. *See Multiple Ownership (Second Report and Order),* 50FCC2d 1046, 1085 (1975), *aff'd in part and modified in part,* 53 FCC2d 589, *modified sub nom. National Citizens Committee for Broadcasting v. F.C.C.,* 555 F.2d 938 (D.C. Cir., 1977), *rev'd,* 436 U.S. 775 (1978) (*Second Report and Order*). In that regard, they declared that the Commission, in allowing the creation of a new cross-ownership with a limited waiver predicated upon future divestiture, stated:

> Thus a grant of temporary waiver conditioned on a sale within a prescribed time offers the opportunity of effecting total dispersal of the multiply-owned properties, while refusing to grant a waiver leaves the accomplishment of the goals of the multiple ownership rules uncertain in the circumstances of this case. [*See Crosby N. Boyd,* 57 FCC2d 475, 483 (1976).]

The petitioners contend that the situation here is different than that in *Crosby N. Boyd* because there the radio/television/newspaper cross-ownership was already in existence and here it would be created anew. They assert that no adequate showing has been presented. They contend that the Commission has stated that it would not give any weight to a showing that does not present a complete description of efforts made to sell the interest, the price at which it is listed and a certified statement by a broker that the price is consistent with the fair market value of the interest. Accordingly, they argue that the subject applications should be designated for hearing.[5] The petitioners maintain that there has been no demonstration that the newspapers are in a precarious position dictating the need for a waiver and, in any event, should a waiver be approved the two year period of time is excessive. Moreover, the petitioners contend that, based on alleged breach of representations to Independent Broadcasting Authority of Great Britain and to the Australian Broadcasting Tribunal,[6] the Commission should impose strict conditions on any waiver that might be approved.[7]

21. In response, News America asserts that in adopting its multiple ownership rules, the Commission stated that, if a broadcast licensee acquired a daily newspaper in the same market, the broadcast licensee would be required to dispose of the station within one year or by the time of the next renewal date, whichever is longer. *Multiple Ownership (Second Report and Order)*, 50 FCC2d at 1076 n. 25. In view of these pronouncements, News America therefore asserts that it appears there is an automatic waiver for a limited time when a broadcast licensee

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[5] *Multiple Ownership (Second Report and Order)*, 50 FCC2d at 1084.

[6] The petitioners state that in 1970, Murdoch acquired control of London Weekend Television, a program service, in violation of the government's Independent Broadcasting Authority's Rules. The rules limit the role of newspaper owners in television programming. After formal admonishment by the British Tribunal, Murdoch relinquished control. They further assert that in 1979, Murdoch represented to the Australian Broadcasting Tribunal that, if it approved his acquisition of television channel 10 in Sydney, he would not change the management at the station and he would not become involved in its operation. Two months following acquisition of the station, changes in management and operation were made. In addition, they state that in 1979 Murdoch promised the Australian Broadcasting Tribunal that he would not seek to acquire television channel 10's affiliate in Melbourne. In April of 1980, he reneged on his promise and filed an application to acquire the station. The Tribunal denied the request and determined that acquisition would not be in the public interest. Subsequently, according to the petitioners, the Australian government amended the Broadcasting Act to permit that acquisition.

[7] Metrowest notes that the *Chicago Sun Times* and the *Chicago Tribune* each own 50 percent of the City News Bureau, which serves as a local news wire service for Chicago area radio and television stations. Seven Chicago television and 19 radio stations are subscribers, according to Metrowest. Metrowest states that this factor should be considered in connection with the waiver request as an additional indicia of news control in the Chicago area. In this regard, we note first that News America exercises only negative control of the City News Bureau. Second, and most important, the News Bureau clearly does not control the content of the news that is offered to Chicago's viewers and listeners. As with any wire service, the News Bureau provides a supplement to the stations' own coverage of news that each licensee, in the exercise of its editorial discretion, is free to accept or reject. Accordingly, we do not find this factor to be significant in connection with the requested temporary waiver of the multiple ownership rule.

acquires a newspaper, and it contends that there is no reason for newspaper owners, who buy broadcast facilities, to be treated differently. *Multiple Ownership,* 53 FCC2d at 592. While noting that there are no reported cases seeking waivers for the creation of newspaper/broadcast combinations, News America avers that the Commission has granted temporary waivers of newly created television/aural combinations. *See Scripps-Howard Broadcasting Co.,* FCC 85-3 (released January 10, 1985), *recon. denied,* FCC 85-425 (released August 2, 1985); and *Gulf Broadcasting Company,* 100 FCC2d 238 (1984). In addition, the Commission has granted temporary waivers to television licensees proposing to acquire a new cable television system. *See* Section 76.501;*WCEE-TV, Inc.,* 61 FCC2d 735 (1976). Most recently, News America states that the Commission granted a one-year waiver to permit divestiture of radio stations when Taft Television and Radio Company acquired numerous television and radio licenses from Gulf Broadcast Company. *See Gulf Broadcasting Company,* FCC 85-287 (released June 3, 1985). Thus, News America concludes the Commission has approved temporary waivers to permit the orderly divestiture of newly created ownership combinations.

22. Specifically, News America states that in establishing the restriction on common ownership of broadcast stations and newspapers in the same community and requiring divestiture to implement its new policy, the Commission expressly stated that "it is not our intention that the rules should work a forfeiture." *Multiple Ownership (Second Report and Order),* 50 FCC2d at 1085. The Commission also recognized that the divestiture was not premised on the existence of improprieties in the operation of the media holdings and stated that "only a sale, not a loss is contemplated." *Id.* Thus, to enable parties to comply with the new rule without working an undue hardship on the parties required to divest, the Commission expressly contemplated "waivers of reasonable duration." *Id.*

23. News America further notes that the Commission set forth several grounds on which a waiver might be permitted, including: (1) inability to sell a station or newspaper, (2) sale of the property is possible only at an artifically depressed price, (3) the inability of the market to support separate ownership and operation of a newspaper and/or television station, and (4) the purpose of the cross-ownership rule would be better served by joint ownership of the television station and newspaper. *Multiple Ownership (Second Report and Order,* 50 FCC2d at 1085. *See also Crosby N. Boyd,* 57 FCC2d at 484. News America avers that the

two-year waiver it has requested is wholy consistent with the purpose underlying the cross-ownership rule and with the criteria the Commission has identified for permitting such waivers.

24. First, the waiver requested, will ensure that the disposition of the assets required by the rule may take place in an orderly manner and it would both protect the diversity of interests fostered by the rule and would avoid undue distortions of marketplace forces in affecting the sale of the properties. In that regard, the Commission has recognized the economic and competitive market place realities of newspaper operations have made it more difficult to sustain competitive major newspapers in the same market. *See e.g., Amendment of Commission Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations,* 45 FCC 1476, 1477 (1964) and *Multiple Ownership (Second Report and Order),* 50 FCC2d at 1073 (presenting the results of studies confirming the decline in newspaper ownership). News America notes that *The Chicago Sun Times* and *The New York Post* represent two of the few remaining challenges to dominant newspapers in major markets; neither of them is dominant in its own market. News America concludes that, in the absence of a reasonable period of time to dispose of these newspapers, it would be under tremendous and unwarranted pressure to sell and that such would create an environment harmful to employee moral and would be unfavorable to the prospect for sustaining the newspaper as strong, health competitors.

25. Second, News America avers that a two-year period in which to sell would clearly reduce the likelihood that the newspapers would have to be sold to competitors, which News America believes would be the parties most interested in acquiring the *Post* and the *Sun-Times.* The waiver period would also permit greater flexibility of News America in seeking potential purchasers and in negotiating terms and conditions reflective of the true market value of the newspapers.

26. Third, News America believes that a two-year wavier period is reasonable under prevailing Commission precedent. In those egregious situations where the Commission required divesture of a commonly owned newspaper, the Commission established a five-year period within which to accomplish divestiture. *Multiple Ownership (Second Report and Order),* 50 FCC2d at 1078–1084. In two major broadcast/newspaper cross-ownership cases, News America states that the Commission granted an indefinite waiver in one and a three-year temporary waiver in the other. *See Field*

Communications Corp., 65 FCC2d 959 (1977) (indefinite waiver to permit continued ownership of daily newspaper in Chicago and WFLD-TV) and *Crosby N. Boyd*, 57 FCC2d at 491 (waiver for three years to permit survival of *The Washington Star* while prospective purchasers sought). News America asserts that both *The New York Post* and *The Chicago Sun-Times* operate in fiercely competitive markets against larger, dominant papers and they are either marginally profitable or unprofitable.

27. Fourth, News America declares that a grant of a two-year would result in some short-term reduction of diversity of the media; however, the presence of numerous additional media outlets in Chicago and New York would surely minimize any such impact. In New York there are three major and seven other daily newspapers, 40 AM and FM radio stations and nine television stations. Chicago has two major daily newspapers and four other daily newspapers, and 11 television stations and 44 AM and FM stations. In order that diversity may not be reduced, News America represents that it will not commingle the operations of the daily newspapers and television stations during the waiver period.

28. We have considered the arguments and responses in regard to the newspaper/television prohibition. We disagree with News America's position that an "automatic waiver" applies to this case. Nevertheless, contrary to the assertions of the petitioners, we believe Section 73.3555(c)(3) may be temporarily waived consistent with the public interest. The existence of the numerous media outlets serving New York, Chicago and surrounding areas supports our conclusion that no undue concentration of the media would result from a limited waiver. Further, we recognize that market factors associated with sales of daily newspapers may be different from those affecting broadcast properties making them more difficult to sell and therefore believe a waiver for a period of 24 months would be appropriate here.[8] That period represents a reasonable balance between the policies expressed in the rule and our belief that, in divestiture cases, reasonable accommodations may be made to avoid the risk of distress sales.[9] In addition, in this case, compelling a sale within a very short time presents a likelihood that only buyers with immediate access to large

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[8] In 1965, Chicago had 7 daily newspapers and New York City had 15 daily newspapers. In 1985, Chicago has 6 and New York City has 10. Information taken from *Editor & Publisher International Year Book* for 1965 and 1985.

[9] As noted in paragraph 26 above, in a slightly different context, we permitted a five-year period within which to divest in egregious cases.

amounts of capital would be successful bidders. Other groups, such as local buyers or minorities,[10] may take a longer period to arrange for the needed funds. By permitting a reasonable time in which to find qualified buyers, we increase the possibility that such buyers may come forward, thereby encouraging diversity in the ownership of the mass media. Finally, we acknowledge and rely upon in making our decision today the representations made by Mr. Murdoch that the operations of the daily newspapers and the television stations will not be commingled during the waiver period. Moreover, we do not believe that strict reporting conditions need be imposed during the waiver period. While the incidents, noted above, indicate that Murdoch changed his earlier stated intentions, the petitioners did state that Murdoch had complied with the conditions imposed and that he did file appropriate applications when necessary. Therefore, we have nothing before us to demonstrate that he will not abide by his representations to the Commission or that he will not comply with the Commission's Rules or its directives. In the event that our perception is proved incorrect, we have adequate administrative remedies to assure compliance.

29. Further, while a prohibited cross-ownership would be created for a short period of time, this transaction would allow grandfathered television/radio cross-ownerships to be broken up in three major markets as a result of a grant of these applications. Presently, Metromedia has the following grandfathered interests: WNEW(AM), WNEW-FM and WNEW-TV, New York, New York; KLAC(AM), KMET(FM) and KTTV(TV), Los Angeles, California; and WASH(FM) and WTTG(TV), Washington, D.C. Therefore, competition among the broadcast media will be increased in three of the country's largest markets. *See Crosby N. Boyd*, above, at 483.[11]

30. In its applications, News America certified that it had available to it sufficient funds to acquire the stations and to operate them for three months. It qualified that certification with

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[10] We have previously recognized that financing is the greatest obstacle to minority entry into the communications industry. *See e.g., Minority Ownership in Broadcasting,* 92 FCC2d 849, 853 (1982).

[11] Since assignment of the licenses of television stations WNEW-TV (New York), KTTV (Los Angeles), and WTTG (Washington, D.C.) will bring Metromedia into compliance with our multiple ownership rule (Section 73.3555), Metromedia has requested that tax certificates be issued pursuant to Section 1071 of the Internal Revenue Code (26 U.S.C. § 1071). The request is in accord with Commission policy. *See Tax Certificates,* 19 RR2d 1831 (1970), *modified,* 59 FCC2d 91 (1976). The Mass Media Bureau will issue the tax certificates in due course.

the following statement: "The Asset Purchase Agreement betweeen the parties is conditioned upon the consent of bondholders to the assignee's assumption of between $1.375 - $1.4 Billion of existing debt. The certification is made in anticipation of the concurrence of the bondholders." The petitioners contend that such a conditional statement is not sufficient to establish News America's financial qualifications. News America, on the other hand, takes the position that Commission approval is a precondition to its refinancing of the existing Metromedia debt and that it cannot formally request bondholders to agree until that condition is met. However, News America notes that it has discussed the transaction with some bondholders, the dealer-manager and the underwriter and concludes from these discussions that it "has reasonable assurance of the availability of the necessary capital to proceed with the refinancing described above." Further, News America represents that it "has access to conventional sources of other capital which, together with its own resources, are sufficient to meet the balance of the contractual obligations to Metromedia and to finance the operation of the stations for the three-month period specified by the Commission after closing."

31. In considering News America's financial qualifications, it is important to note the standard to be applied. The buyer must be able to certify[12] that it has the resources to consummate the sale and to operate the stations for three months. However, we do not require the applicant to prove the availability of the necessary funds. Instead, we have long held that applicants have a "reasonable assurance" that the funds are available. *See e.g., Midwestern Broadcasting Co.,* 15 FCC2d 720, 721 (1968). That "reasonable assurance" standard is expressly set out in Question 2(a), Section III of the form. News America represents that it has discussed the matter with some bondholders and with other knowledgeable sources. It concludes that there is a reasonable assurance that the necessary approval will be forthcoming with respect to the refinancing of Metromedia's existing debt. In addition, News America has also represented that it has access to conventional sources of capital and its own resources that are sufficient to meet its commitments.

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[12] We have relied on certifications for several years now. *See Revision of Form 301,* 50 RR2d 381, 382 (1981). The rationale set out in that decision provided the basis for the subsequent revision of the assignment application to use the same financial certification.

32. The petitioners in essence request News America to submit the detailed showing rejected when we changed the form to require only a certification. The petitioners, in our view, have not made a case to warrant departing from the normal practice of relying on a certification. In our judgment, the representations of News America provide the necessary "reasonable assurance" as to its financial qualifications, and no further inquiry on this point is warranted.

Conclusion

33. In view of the foregoing, we find that the petitions filed by Gottfried, Fleishman, NCTV, MAP, WATCH, and Metrowest have failed to raise any substantial and material questions of fact to establish that a grant of these applications would be inconsistent with the public interest. We further find that the applicants are fully qualified and that a grant of these applications will serve the public interest, convenience and necessity.

34. Accordingly, IT IS ORDERED, That the petition to deny, jointly filed by Sue Gottfried, individually and on behalf of a class of deaf and hearing impaired individuals, and by Stanley Fleishman, on behalf of the California Association of the Physically Handicapped, Inc., Patty Ann Berkosky, individually and representing a class of physically handicapped persons, and the Law Institute for the Disabled and Elderly at Southwestern University School of Law, IS DENIED.

35. IT IS FURTHER ORDERED, That the petition to deny filed by the National Coalition on Television Violence IS DENIED.

36. IT IS FURTHER ORDERED, That the petition to deny filed by the Media Access Project, on behalf of Telecommunications Research and Action Center, Black Citizens for Fair Media, Health and Medicine Policy Research Group, New York Public Interest Research Group, Charles Benton, Msgr. John Egan, Jane Ramsey and Kale Williams, IS DENIED.

37. IT IS FURTHER ORDERED, That the petition to deny filed by the Washington Association for Television and Children IS DENIED.

38. IT IS FURTHER ORDERED, That the petition to deny filed by Metrowest Corporation IS DENIED.

39. IT IS FURTHER ORDERED, That the motion to waive compliance with court order and petition to deny filed by Anthony R. Martin-Trigona ARE DISMISSED, and the petition,

when considered as an informal objection, IS DENIED.

40. IT IS FURTHER ORDERED, That the applications assigning the licenses of television stations WNEW-TV and W64AA, New York, New York; KTTV, Los Angeles, California; KRLD-TV, Dallas, Texas; KRIV-TV, Houston, Texas; and WTTG, Washington, D.C., from Metromedia Radio & Television, Inc. to News America Television Incorporated, and the application assigning the license of television station WFLD-TV, Chicago, Illinois, from WFLD Television, Inc. to News America Television Incorporated, ARE GRANTED and are subject to the condition that News America Television Incorporated and its principal, K. Rupert Murdoch, divest themselves of their interests, direct or indirect, in *The New York Post* published in New York, New York, and in *The Chicago Sun-Times* published in Chicago, Illinois no later than twenty-four months from the date of consummation of this transaction.

41. IT IS FURTHER ORDERED, That the application assigning the license of television station WCVB-TV, Boston, Massachusetts, from Metromedia Radio & Television, Inc. to The Hearst Corporation IS GRANTED.

42. Finally, copies of this Memorandum Opinion and Order shall be sent Certified Mail — Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

STATEMENT OF CHAIRMAN MARK S. FOWLER

Re: Broadcast Ownership Waivers

The Commission today decides to grant waivers in two transfer cases: ABC/Capital Cities and Metromedia/News America. We have given the waiver requests in each of these cases the hard look required by the Communications Act and the Administrative Procedures Act. While these cases will remain, of course, *ex parte* for some time to come, I want to explain clearly my decisions in these cases.

The Commission is being entirely consistent and logical. As a matter of policy, waivers will be granted when they are in the public interest. It is in the public interest to grant waivers when grant of the waiver better serves the goals of a rule than does strict enforcement of the rule. Any decision otherwise is an exercise in form over substance.

In both these cases, the goal of the rules is diversity. In both cases, that goal is better served by the waivers being granted. The Capital Cities permanent waiver is based on the unique circumstances presented: the fact that the markets are truly separate, and that both stations are ABC affiliates; the special Congressional concern for states without adequate VHF service enunciated in Section 331 of the Communications Act; the number of other media outlets in the service areas; and the voluntary proposals to provide special local service to certain areas within the stations' service areas.

The News America waiver also serves the purposes of diversity better than blind enforcement of the rule, given the circumstances of the case. The applicant has shown among other things: that there are a substantial number of media outlets; that the temporary waivers sought are within the boundaries of reasonableness which the Commission specifically contemplated in its decision adopting the rule (so as to avoid harsh and harmful distress sales of media facilities); that the universe of buyers of daily newspapers is small, and is smaller than that for other media properties; that the margins on which the papers are operating make more difficult their sale; and that diversity wouldn't be served by closing down the papers or selling them to competitors.

Moreover, as a general matter, the purposes of diversity are not served by forcing quick sales of media properties which may well cut out all buyers except those with deep pockets and ready cash. With all the attempts the Commission has made to help expand the pool of those competing for media properties, it would be unwise here to reverse course and automatically exclude new entrants such as minorities and others who may need time to put together financing or who can't afford to tie up funds in commitment fees contingent upon FCC approval which may take six months or longer. And strict rules might prevent qualified buyers with other media holdings from bidding at all, out of concerns about the hardship strict divestiture may require. Such narrowing of the pool of potential licensees is antithetical to the diversity goal. That's excoriating the goal and glorifying the rule.

The Cap Cities waviers — even though one is permanent — have attracted relatively little opposition or attention. The News America waivers — although only temporary — have been a lightening rod for the outpouring of concern and opinion. Moreover, News America's temporary waiver request showings are easily as substantial as the showings Cap Cities made for its temporary waivers. This disparate treatment, particularly by public officials, is confusing and troubling, especially since adequate showings were made by both.

One might reach the conclusion that the keen interest in the News America waivers is disingenuous. Rupert Murdoch, The News America principal, is a frank, outspoken entrepreneur with a well-known personal philosophy.

I suggest that if this is really what the din of Congressional and "consumer group" concern is all about, it's a vivid reaffirmation of the electronic press' need for First Amendment protection from the government. No matter how cleverly cloaked, a public official's distate for the content of an applicant's speech must never be used to prevent the grant of a license if that applicant is qualified. It's precisely that type of misuse of government processes that the First Amendment was intended to prevent. With some bumps, detours, and delays in these cases, the First Amendment has won out.

Carelessness
Character Qualifications, Nondisclosure
Issue, Enlargement of, Denied

Review Board granted summary affirmance of Initial Decision in comparative FM broadcast case where winner had overwhelming media diversification preference and slight ownership integration preference but loser had no preferences. Board rejected issue enlargement petition urging exploration of Section 1.65 failure to disclose and carelessness issues, because of absence of *prima facie* showings that deficiencies were decisionally significant or intentional.

— *Music Sound Radio, Inc.*

MM Docket 83-1068

FCC 85R-104

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
MUSIC SOUND RADIO, INC. Sand Springs, Oklahoma	MM DOCKET NO. 83-1068 File No. BPH-811218AL
WILL-CAN COMMUNICATIONS, INC. Sand Springs, Oklahoma	MM DOCKET NO. 83-1073 File No. BPH-820624BX

Appearances

James B. Kenkel and *Mark J. Palchick*, on behalf of Music Sound Radio, Inc.; and *Thomas W. Fletcher*, on behalf of Will-Can Communications, Inc.

DECISION

Adopted: December 27, 1985; Released: January 7, 1986.

BY THE REVIEW BOARD: MARINO (Chairman), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. In the as-yet unwritten Marquis of Queensberry rules of comparative broadcast hearings, special credit should be given to the losing applicant who, when totally outclassed, quietly retreats from the field of battle instead of continuing to skirmish with a belated array of ragged arguments. No such merit would be awarded in the instant case, where the hearing was conducted and the record closed on August 21, 1984, proposed findings and conclusions were filed on November 5, 1984, and Music Sound Radio, Inc. (Music Sound), sensing imminent defeat, filed a barrage of motions to enlarge issues against the clear winner, Will-Can Communications, Inc. (Will-Can), on November 1, 1984, January 11, 1985, and July 12, 1985. We find these sour grape(shots) essentially jejune and summarily affirm the grant of Will-Can's application for authority to construct a new FM station at Sand Springs, Oklahoma.

2. The subject proceeding was designated for hearing on the standard comparative issue only by Hearing Designation Order, 48 Fed. Reg. 47065, published October 17, 1983. Only two of the original six applicants remain. In Initial Decision (I.D.), FCC 85D-47, presiding Administrative Law Judge (ALJ) John H. Conlin awarded Will-Can a substantial preference under the diversification of media control criterion of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), and a moderate preference under the ownership integration criterion, I.D. paras. 27, 29. No preferences were given to Music Sound, and Will-Can's application was granted. I.D. paras. 31-32. Music Sound has excepted to both of Will-Can's preferences and to the ALJ's refusal to add public file (Section 73.3526), hearing public notice (Section 73.3594), transmitter site availability, FAA clearance, and carelessness/ineptness issues against Will-Can via his interlocutory rulings in Memorandum Opinions and Order, FCC 85M-668, released February 13, 1985, and FCC 85M-2662, released July 1, 1985. In addition, Music Sound filed a separate

motion to enlarge issues with the Review Board on July 12, 1985, in which it requests that the proceeding be remanded for further hearing on Section 1.65 reporting, misrepresentation, and ineptness issues pertaining to former Will-Can principal Ronald L. Young's undisclosed involvement with a Tulsa, Oklahoma television application. Will-Can has responded with a reply brief, limited exceptions, and opposition pleadings which include three petitions for leave to amend.

3. Based on our review of the I.D., the exceptions and reply briefs, Music Sound's motion, Will-Can's reply pleadings and amendments, the oral argument held November 15, 1985, and the existing factual record, we find no basis to overturn the ALJ's conclusion that grant of Will-Can's application will better serve the public interest, convenience and necessity. However, Music Sound's persistence has succeeded in slightly tarnishing the glow of Will-Can's superiority, as we shall briefly relate.

4. Turning first to the standard comparative issue's diversification criterion, we agree with Will-Can that its 45% attributable ownership of *Shampoo and Beauty News*, a quarterly trade magazine whose distribution is limited to beauty shops, should not be regarded as a media interest. *See Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 272, 56 RR 2d 275, 282 (Rev. Bd. 1984), *rev. denied*, 57 RR 2d 1390 (Comm'n 1985). Hence, since Will-Can has no attributable media interests while Music Sound is the 100% owner and licensee of the only broadcast facility licensed to Sand Springs, full-time AM Station KTOW, Will-Can is entitled to a well-nigh overwhelming diversification preference over Music Sound. *See Windham Broadcasting Group*, 49 FCC 2d 560, 31 RR 2d 1292 (ALJ), *aff'd*, 49 FCC 2d 556, 31 RR 2d 1289 (Rev. Bd. 1974).[1]

5. As to the ownership, integration criterion, both applicants express unhappiness with the moderate preference given to Will-Can based on its full-time integration of proposed general manager and 10% owner Ronald Young and proposed public affairs director and 22.5% owner Chapman R. Cannon, Jr. (32.5% total) versus Music Sound's full-time integration of proposed general manager and 5% owner Joseph Bowen (5% total).

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[1] As in *Perry S. Smith*, FCC 85R-40, released May 9, 1985 (Rev. Bd.), at n. 3, we reject Music Sound's claim to any diversification *preference* based on its proposed AM/FM combination. In *Multiple Ownership of AM and FM Stations*, 51 RR 2d 449, 451-52 (1982), the Commission noted that AM/FM combinations may afford certain public interest benefits but expressly declined to initiate a rulemaking proceeding to prohibit such combinations despite their *anti-diversity* implications, not because of them.

Will-Can excepts to the ALJ's refusal to treat Will-Can's proposed program/news director and 22.5% owner Donnie E. Cannon as having a true supervisory and managerial position and objects to giving full credit to Music Sound's Joseph Bowen, who will serve as general manager of the proposed FM station as well as its existing AM counterpart, KTOW. On the other hand, Music Sound excepts (without any of the specificity required by Section 1.276(a)(2) of the Commission's Rules) to the ALJ's denial of part-time credit for the proposed 20-hour per week integration of 47.5% owner Luther C. Graham as business manager. We affirm the ALJ's refusal to credit either Donnie Cannon or Luther Graham with significant management involvement at their proposed stations. *See Minority Broadcasters of East St. Louis, Inc., supra.* However, we agree with Will-Can that Joseph Bowen's integration credit must be somewhat diminished because he will be dividing his time between two broadcast stations. *See Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 53 RR 3d 1175 (Rev. Bd. 1983), *rev. denied*, FCC 84-11 (Comm'n 1984). We must also take account of Will-Can's July 29, 1985 petition for leave to amend, in which it reports that Ronald Young has withdrawn from Will-Can. Consistent with *Nuance Corp.*, 85 FCC 2d 412, 49 RR 2d 147 (Rev. Bd.), *rev. denied*, FCC 81-473 (Comm'n 1981), we will accept that amendment for updating purposes only and will reduce Will-Can's full-time integration credit to 22.5% to reflect Young's departure without permitting Will-Can to glean any comparative advantage therefrom (see paragraphs 7-8, *infra*). As a result, Will-Can's integration preference will be reduced to slight, although Will-Can still enjoys a clear quantitative advantage over Music Sound. *See Gilbert Group, Inc.*, 88 FCC 2d 401, 50 RR 2d 87 (Rev. Bd. 1981), *rev. denied*, FCC 82-228 (Comm'n 1982) (slight integration credit awarded for 25% versus 11% full-time proposals).

6. Next, we turn to Music Sound's exceptions concerning the ALJ's refusal to add public file, delayed public notice, site availability, FAA clearance, and carelessness/ineptness issues against Will-Can. See paragraph 2, *supra*. The ALJ gave full consideration to these matters in FCC 85M-668, *supra*, and FCC 85M-2662, *supra*, and denied the requested issues on the grounds of gross untimeliness, absence of *prima facie* cases, and lack of decisional significance. We agree with the ALJ's reasoning in all respects but one. While it is quite clear, despite Music Sound's spirited advocacy, that throughout this proceeding Will-Can has had only a single transmitter site and never lost reasonable

assurance of that site's availability, two engineering amendments were required before the site was accurately identified verbally and by geographical coordinates. Thus, good cause existed to accept the amendments, which never altered the physical location of the site by more than 400 feet. *See Brownfield Broadcasting Corp., supra*. But, as of the time of the I.D., Will-Can had not received FAA approval for the corrected coordinates. Hence, Will-Can's grant was technically flawed, albeit in a much less serious way than *Neil I. Sanders*, 59 RR 2d 176 (Rev. Bd. 1985), where summary decision was granted against an applicant for failure to meet a designated air hazard issue based on an FAA denial of clearance. *Cf. Wise County Messenger, Inc.*, FCC 85M-4507, released November 18, 1985 (ALJ) (grant held in abeyance until FAA clearance received). On September 18, 1985, Will-Can filed the necessary FAA approval, issued on August 30, 1985, which removed the engineering infirmity. Because the clearance was diligently sought and otherwise meets the criteria of *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970), as modified by *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 49 RR 2d 1589 (1981), the application amendment will be accepted.

7. What remains for consideration is Music Sound's July 12, 1985 enlargement motion, which seeks the addition of basic disqualifying and comparative qualifications issues against Will-Can because of the failure of Will-Can to amend its application timely to report that Will-Can's then-president, director, and 10% shareholder Ronald Young had an interest in another pending broadcast application. Music Sound further alleges that Young's proposal to serve as full-time general manager of the Will-Can station was inconsistent with his ownership integration plans at the other proposed station, and that the non-reporting and integration inconsistencies constitute misrepresentations and are further indications of Will-Can's carelessness, ineptness, and general unsuitability to be a Commission licensee. Specifically, it appears that at least since January 8, 1985, when EAM Broadcasting filed an application for a new television station at Tulsa, Oklahoma, Young was an EAM principal, and that on February 28, 1985 he became the sole general partner and 20% equity owner of the EAM limited partnership. These matters first came to Music Sound's attention on July 2, 1985, when the hearing designation order in the Tulsa case was released by the Commission, *Tulsa Broadcasting Group*, Mimeo No. 5465. As of that date, Young's role in EAM had not been reported in the Will-Can

application or vice-versa. On July 10, 1985, Will-Can's counsel first learned about Young's EAM involvement, and the following day Will-Can filed a notice of intention to amend its application, in which it disclosed that knowledge. Music Sound filed its enlargement motion one day later, which Will-Can opposed July 29. Its opposition was accompanied by a petition for leave to amend, in which it reported that on July 23, Will-Can relieved Young of his positions as president and director and transferred his stock to someone else. By affidavit and pleadings, Will-Can avers that its principals had no knowledge of Young's EAM involvement until July 10; that it "voluntarily" disclosed his involvement as soon as it found out and before Music Sound filed its motion; that Young has withdrawn from Will-Can and the EAM application has been dismissed at EAM's request; that no more than a slight comparative demerit against Will-Can could appropriately be assessed under these circumstances; and that Will-Can's significant comparative advantages over Music Sound would outweigh any such demerit.

8. We will not add the requested issues. Music Sound has not made an adequate *prima facie* showing that Young's unreported interest was of decisional significance, that Young or Will-Can intended to conceal Young's EAM interest, or that this single reporting incident reflects "significant carelessness or inattentiveness." *Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n. 9, 57 RR 2d 713, 716 n. 9 (1984). Moreover, even if we were convinced that issues should be added, we do not believe that any resulting demerit would affect the relative comparative positions of the two applicants; hence, remand would be a mummery. *See Radio Laredo, Inc.*, 87 FCC 2d 353, 49 RR 2d 1489 (Rev. Bd. 1981), *rev. denied*, FCC 82-62 (Comm'n), *aff'd per curiam sub nom. Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982). *Compare Town and Country Radio, Inc.*, 70 FCC 2d 572, 575–76, 44 RR 2d 149, 153–54 (Rev. Bd. 1978) (minor demerit for unintentional but careless reporting violations), *with Radio WABZ, Inc.*, 90 FCC 2d 818, 827, 51 RR 2d 1507, 1515 (1982), *aff'd sub nom. Victor Broadcasting Inc.* v. *FCC*, 722 F.2d 756 (D.C. Cir. 1983) (moderate demerit for numerous reporting violations reflecting "an inattention to . . . reporting requirements"). It is well established that no diversification demerit is assessed because of ownership interests in pending broadcast applications (as opposed to authorized facilities), *Theodore Granik*, 8 FCC 2d 1068, 1074, 10 RR 2d 659, 668 (Rev. Bd. 1967), and disallowing integration credit in the instant case because of what might be

contingent integration proposals,[2] *see Metro Broadcasting, Inc.*, 99 FCC 2d 688, 57 RR 2d 440 (Rev. Bd. 1984), *rev. denied*, FCC 85-558 (Comm'n 1985), would not eradicate Will-Can's integration preference. See paragraph 5, *supra*. Hence, we detect no inherently deceptive intent in Will-Can's reporting omission. In addition, Will-Can's averment that its other principals were unaware of Young's EAM activities is unchallenged, and that fact, plus Will-Can's prompt reporting of the belatedly-learned information before Music Sound's motion was filed and Young's swift departure from Will-Can, would further militate against any significant reporting demerit. *See Nuance Corp.*, *supra*.

9. *Final Comparative Evaluation*. All decisionally significant exceptions have been considered by the Board. Under the *Policy Statement*, *supra*, Will-Can's diversification and ownership integration preferences make it the clear winner. However, our refusal to add any carelessness or ineptness issue against Will-Can should not be interpreted as satisfaction with the mild levels of bungling that it exhibited in the public file, public notice, site specification, and Section 1.65 reporting aspects of this proceeding. Cognizant that in *Houston Family Television, Ltd.*, 58 RR 2d 1557, 1560 (Rev. Bd. 1985), which is relied upon by Music Sound, we recently assessed a substantial comparative demerit for a "pattern of significant carelessness and misrepresentation," we have concluded here that, on balance, the alleged blunders are not significant enough to warrant further inquiry, especially in light of Will-Can's clear comparative superiority. Nevertheless, we admonish Will-Can's principals and their legal and engineering advisers for their miscues and warn that we will not be as forgiving of any future peccadillos. *See Merrimack Valley Broadcasting, Inc.*, *supra* (case remanded for exploration of winner's further reporting failures).

10. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Will-Can Communications, Inc. on July 29, August 21, and September 18, 1985 ARE GRANTED and the amendments ARE ACCEPTED; and

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[2] As of the time of Music Sound's subject motion, EAM Broadcasting had not yet been required to set forth its ownership integration proposal. Hence, it is only speculative that Young's Will-Can integration commitment would have been weakened by whatever its Tulsa commitment might be. The opposite is more likely, since by early 1985 this proceeding was almost concluded but the Tulsa applications had just been filed. Giving the Tulsa application secondary priority would not have endangered Young's Will-Can commitment.

11. IT IS FURTHER ORDERED, That the application of Will-Can Communications, Inc. (File No. BPH-820624BX) for authority to construct a new FM broadcast station at Sand Springs, Oklahoma IS GRANTED, and the application of Music Sound Radio, Inc. (File No. BPH-811218AL) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 85D-47

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
MUSIC SOUND RADIO, INC. Sand Springs, Oklahoma	MM DOCKET NO. 83-1068 File No. BPH-811218AL
WILL-CAN COMMUNICATIONS, INC. Sand Springs, Oklahoma	MM DOCKET NO. 83-1073 File No. BPH-820624BX

Appearances

John B. Kenkel, on behalf of Music Sound Radio, Inc.; and *Thomas W. Fletcher* on behalf of Will-Can Communications, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOHN H. CONLIN

Issued: June 28, 1985; Released: July 3, 1985

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Music Sound Radio, Inc. (Music Sound) and Will-Can Communications, Inc., (Will-Can) for a construction permit for a new FM broadcast station on Channel 272A (107.9 mHz) at Sand Springs, Oklahoma.[1]

2. On October 12, 1983, the applications were designated for hearing on the following issues:

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[1] At the time of designation for hearing, Tulsa County Radio, Ltd., Keystone Communications, Inc. and Advantage Enterprises, Inc. were also applicants in this proceeding. Their applications were dismissed by *Order* released September 7, 1984 (FCC 84M-3839). Another application, that of Elinor Lewis-Stephens, was dismissed by *Order* released March 13, 1985 (FCC 85M-1045).

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

3. The *Hearing Designation Order* noted differences with respect to the coverage areas of the parties and provided that evidence as to coverage could be submitted under the standard comparative issue. However, the applicants who eventually went to hearing stipulated that there were no significant differences in coverage areas and populations served; and that in the common as well as non-common 1 mv/m areas there were five or more aural services. Tr. 17-18. Therefore, no findings are made with respect to coverage.

4. A prehearing conference was held on January 9, 1984. The hearing was held on August 21, 1984 and the record was closed on the same day. Proposed findings and conclusions were filed on November 5, 1984 and replies thereto were submitted on December 3. Thereafter a post-hearing conference was held on April 25, 1985 to discuss several interlocutory matters that had arisen after the closing of the record.[2]

Findings of Fact

Music Sound Radio, Inc.

5. *Ownership*. Music Sound is an Oklahoma corporation whose shareholders, officers and directors are: Joseph Bowen, President, Director and 5% shareholder; Luther C. Graham, Secretary, Treasurer, Director and 47.5% shareholder and John B. Jarrett, III, Vice President, Director and 47.5% shareholder.

6. *Diversification*. Music Sound is the licensee of AM broadcast station KTOW, Sand Springs, Oklahoma (Class IV, 500 watts daytime, 250 watts nighttime). Other than its interest in KTOW, neither Music Sound nor any of its shareholders has any interest in any other medium of mass communication or application therefor. KTOW is the only station licensed to Sand Springs.

7. *Integration of Ownership and Management*. Joseph Bowen is the President, Director and 5% shareholder of Music Sound. He has resided in Sand Springs for the past ten years. Mr Bowen has had extensive broadcast experience. He was a salesman at

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[2] See *Order* released July 1, 1985 (FC 85M-2662).

KSIR(AM) in Wichita, Kansas from 1963 to 1965; and from 1965 to 1968 he held a similar position at KOOO, Omaha, Nebraska. Between 1970-1973 he was sales manager at KBIL in Kansas City, Missouri. In 1973 Mr. Bowen moved to Sand Springs where he became the general manager of AM station KTOW. When Music Sound acquired KTOW in 1979, Mr. Bowen became the president, a director and stockholder of the company and continued to work 40 or more hours a week as the station's general manager.

8. For the past 10 years, Mr. Bowen has been a member of the Sand Springs Chamber of Commerce, and in 1975 he was elected to the Board of Directors of that organization. Should the application of Music Sound be granted, Mr. Bowen will be integrated into the day-to-day management of the station as general manager. Mr. Bowen will work at the station on a full-time basis, spending betwen 40 and 80 hours per week performing his duties at the proposed FM station and at KTOW, with at least 40 hours being spent at the FM station. Tr. 47. As general manager Mr. Bowen will be responsible for the day-to-day supervision of all aspects of management and operation of the station. Mr. Bowen will have supervisory authority over all departments of the station, including the news, promotion, public affairs, programming, sales, engineering and business departments.

9. Luther C. Graham is the Secretary/Treasurer, a Director and 47.5% shareholder of Music Sound. Mr. Graham has lived in the Sand Springs community for the past 35 years. In the event that Music Sound is awarded the construction permit, Mr. Graham will devote at least 20 hours per week to the operation of the proposed facility. As business manager, Mr. Graham will be responsible for the financial well-being of the station and will participate in all operating and programming decisions which effect the financial stability of the station. Mr. Graham will not have day-to-day supervisory activities with respect to station employees but he will "supervise [their] overall performance." Music Sound Ex. 3, p. 1. In his testimony Mr. Graham stated that this 20 hour per week involvement with the station would including talking to his son, a station employee, in the evening and "involvement in the community." Tr. 56.

10. As an officer and director of Music Sound, Mr. Graham has worked in programming, advertising, community relations and employment matters. In the early years of Music Sound's ownership of station KTOW, Mr. Graham doubled as a disc-

jockey, conducting his own radio program. Mr. Graham was appointed vice-chairman of the Sand Springs Planning Commission in 1980 and in 1983 was appointed chairman of the Urban Renewal Board. In addition, Mr. Graham has been a member, director, vice president, and, in 1984, president of the Sand Springs Chamber of Commerce. Mr. Graham also served as vice president and president of the Sand Springs Schools Band Booster Club, and has been a member of that organization for eight years.

11. No cognizable ownership integration is claimed for Music Sound's remaining stockholder.

12. *Auxiliary Power*. In the event of a grant Music Sound will install auxiliary power equipment so that the station may remain on the air in the event of a power failure.

Will-Can Communications, Inc.

13. *Ownership*. Will-Can is a corporation with the following officers, directors and stockholders:

Name & Residence	*Office*	*Director*	*% Ownership*
Ronald L. Young 2445 S. 108 E. Ave. Tulsa, Oklahoma	President	Yes	10%
Chapman R. Cannon, Jr. 3605 N. Louisville St. Tulsa, Oklahoma	Vice President	Yes	22.5%
Donnie E. Cannon 3605 N. Louisville St. Tulsa, Oklahoma	Sec'y-Treas	Yes	22.5%
Lloyd H. Williams 3646 N. New Haven Tulsa, Oklahoma	---	Yes	22.5%
Janis A. Williams 3646 N. New Haven Tulsa, Oklahoma	---	Yes	22.5%

14. *Diversification*. Will-Can is the lessee of a sideband FM channel, with Tulsa Cable, a CATV System, delivering the service to subscribers in Tulsa. In addition, Will-Can is the lessee in a time brokerage agreement with station KXOJ, Sapulpa, Oklahoma, for the lease of broadcast time. Will-Can has made a timely commitment to divest itself of its lease of the sideband FM channel and its brokerage agreement with KXOJ if the application for the Sand Springs facility is granted. Exhibit 6, page 2; Amendment to Application filed on October 20, 1982 and Exhibit

1 to Application File No. BPH-820624BX. Chapman R. Cannon, Jr., and Donnie E. Cannon are each officers, directors and 15% stockholders in Mican Corp. of Texas, an applicant for a new FM station at Lubbock, Texas. In addition the Cannons own a company which publishes *Shampooo and Beauty News*. This magazine is a specialized quarterly publication distributed to beauty shops but not available at newsstands. Tr. 140, 154-155. Other than the above listed interests, neither Will-Can Communications nor any of its principals have any ownership interest in or connection with any AM, FM or television broadcast station, cable television system or newspaper/magazine publication.

15. *Integration of Ownership and Management*. Ronald L. Young wlll devote full-time (a minimum of 40 hours per week) to the operation of the proposed FM station in Sand Springs as the General Manager and General Sales Manager. He will have overall supervision and direction of station operations and sales management and development. He is a black male who has lived in Tulsa for 13 years.[3] His residence is within the primary service area of Will-Can's proposed station. Will-Can Ex. 2, para. 4; Tr. 123.

16. Mr Young is a graduate of Indiana Central University with a B.A. degree. He also has received an Associate Degree in Theology from the Grace Apostolic Bible School. Mr. Young worked in research and sales at a pharmaceutical company for 15 years. From July, 1978 through February, 1979 he was the Municipal Court clerk for the city of Tulsa and until November, 1983 the Commissioner of Finance and Revenue for the City of Tulsa. He has no experience in broadcasting. He is presently engaged in the insurance business, but in the event of a grant he would devote no more than 15 hours per week to this activity.

17. Mr. Young is not a member of any Sand Springs Civic organizations, but he is a member of several such groups in Tulsa: North Tulsa Ambulatory Care, Inc.; NAACP; Greenwood Chamber of Commerce; Tulsa Urban League; Tulsa Council for International Visitors; and Tulsa Community Action Agency.

18. Chapman R. Cannon, Jr. will devote full-time (a minimum of 40 hours per week) to the operations of the proposed station, serving as its Public Affairs Director. Mr. Cannon is self-employed, having a one-half ownership interest in American Beauty Products Co., Inc., a beauty supplies manufacturer to which he presently devotes 30 hours weekly. In the event Will-Can receives the FM construction permit, Mr. Cannon will

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[3] Sand Springs is located about 10 miles west of Tulsa Will-Can Ex. 2, p. 4.

devote only 10-15 hours per week to the American Beauty Products. Will-Can Ex. 2, p. 2; Tr. 138. In order to accommodate his full-time commitment to the proposed FM station and reduce his time at American Beauty products, he will relinquish the presidency of the company to an employee who has been with him for 18 years and presently manages the business. (Tr. 153).

19. Mr. Cannon, a black male, has lived in Tulsa since 1968, and for the past 12 years has resided at 3605 N. Louisville Street, which is within the primary service area of Will-Can's proposal. Will-Can Ex. 2, pp. 2, 4. Mr. Cannon graduated from Michigan State University, East Lansing, Michigan, receiving a degree in Business Administration. He has no broadcast experience, but has considerable management experience in connection with American Beauty Products.

20. Mr. Cannon is a member of area-related organizations, such as: the Metropolitan Tulsa Chamber of Commerce; the Greenwood Chamber of Commerce; the Masonic Lodge; the Morningstar Baptist Church; and sits on the Board of the Star Mental Health Center.

21. Donnie E. Cannon proposes to devote full-time (a minimum of 40 hours per week) to the operation of the proposed station as the Program/News Director, with responsibility for implementation of programs and news and policies related thereto. Will-Can Ex. 4, p. 3; Tr. 166, 168. Asked if she would be supervising station employees, Mrs. Cannon stated: "Well, as program director I would come in contact with employees and, of course, I would come in contact with people in the area [who could] help us get my program together . . ." Tr. 168. The general manager would, however, supervise the staff employees. Id.

22. Mrs. Cannon is the other one-half owner of American Beauty Products Co., Inc. While formerly devoting 40 hours per week to the business, Mrs. Cannon presently spends approximately 30 hours per week on company affairs. Tr. 164, 165. In the event Will-Can receives the FM construction permit, Mrs. Cannon will reduce that time to 15-20 hours per week. Will-Can Ex. 3, p. 2.

23. A black female, Mrs. Cannon has resided in Tulsa since 1968, and for the past 12 years has resided at 3605 N. Louisville Street, which is within the primary service area of Will-Can's proposal. Will-Can Ex. 3, p. 2; Tr. 122, 123. Following high school, she attended and completed schools of basic and advanced cosmetology and hair-styling and holds an Advanced Teacher's Degree in Cosmetology. She has no broadcast experience but has

acquired business experience as Executive Vice-President of American Beauty Products. Will-Can Ex. 3, p. 2.

24. Mrs. Cannon is a member of the Tulsa Urban League, NAACP, YWCA, and Business and Women Progressive Club. In 1977, she was selected as one of the YWCA's Outstanding Woman in Industry and in 1984 was awarded an honorary Doctor of Law degree from Bethune-Cookman College.

25. Lloyd H. Williams, a black male, and his wife Janis A. Williams, a black female, are stockholders and Directors of Will-Can. They also reside in Tulsa. No integration credit is claimed for either Mr. or Mrs. Williams (Tr. 16).

26. *Auxiliary Power Facilites* Will-Can has proposed the availability and installation of auxiliary power equipment.

Conclusions

27. Music Sound owns KTOW, a full-time AM station and the only broadcast facility licensed to Sand Springs. Two of Will-Can's principals own a company which publishes *Shampoo and Beauty News* a quarterly trade magazine whose distribution is limited to beauty shops. This being its only attributable media interest, Will-Can is entitled to a substantial preference for diversification of ownership interests in media of mass communications.

28. Under Music Sound's proposal Joseph Bowen (5%) would be integrated full-time in day-to-day management of the station, serving as its General Manager. Luther Graham (47.5%) would serve as business manager, working about 20 hours per week. As for Will-Can, Ronald Young (10%) would work full-time as the station's General Manager; Chapman Cannon (22.5%) would be employed full-time as the Director of Public Affairs; and Donnie E. Cannon (22.5%) would be employed full time as Program/News Director. Thus on the face of it Will-Can's proposed integration is vastly superior to that of Music Sound.

29. Though the record is not fully developed on the matter, the presiding officer is somewhat reluctant to give full credit to the integration proposed by Mr. Graham and Mrs. Cannon. Graham's 20 hours per week apparently includes talking to his son (a station employee) in the evening about station affairs, as well as the time he devotes to community involvement. Neither of these activities involves day-to-day participation in station managmenet as that term is commonly understood. Similarly, Mrs. Cannon's description of her proposed functions (para. 21 *supra*) creates

some doubt about the scope of the supervisory and managerial tasks she will actualy perform. However, if the contributions of these individuals were removed from the comparison, Will-Can would still retain a clear advantage: 32.5% full-time integration vs. 5% for Music Sound. Either way, the difference is sufficient to warrant a moderate preference for Will-Can.[4]

30. Both applicants propose the use of auxiliary power equipment so that the station may remain on the air in the event of a power failure.

31. Will-Can has been credited with a substantial preference for diversification and a modest preference for intergration of ownership and management. In no area of comparison is Music Sound entitled to a preference. The public interest would therefore be better served by a grant of Will-Can's application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Will-Can Communications, Inc. IS GRANTED and the application of Music Sound Radio, Inc. IS DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

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[4] The quantitative difference between the applicants is sufficient to make consideration of qualitative factors unnecessary. *See New Continental Broadcasting Company*, 88 FCC 2d 830, 850 (Rev. Bd. 1981) (qualitative factors not sufficient to overcome a clear quantitative difference of 12.5%). *See also Leflore-Dixie, Inc.*, 57 RR 2d 1155, 1159 (Rev. Bd. 1985). It is noted, however, that both applicants have strong qualitative credentials. Music Sound's principals have broadcast experience and are local residents with good records of civic participation. Will-Can is entirely minority-owned, its principals live within the service area and have strong records of civic participation in Tulsa, which is within the service area. Any preference awarded would be small and could not affect the outcome.

[5] In the event execeptions are not filed within 30 days after the release of the Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Cable TV
Cable Technical Standards

Commission eliminated technical performance standards for the retransmission of Class I channels by cable television systems that are subject to effective competition.
— *Part 76, Cable TV*
MM Docket 85-38

Cable TV
CATV Jurisdiction Over, by FCC

Commission reaffirmed its present policy of preemption of State and local technical standards for cable television.
— *Part 76, Cable TV*
MM Docket 85-38

FCC 85-587

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Review of the Technical and Operational Requirements of Part 76, Cable Television	MM Docket No. 85-38

REPORT AND ORDER

Adopted: October 31, 1985; Released: December 17, 1985

BY THE COMMISSION: CHAIRMAN FOWLER CONCURRING AND ISSUING A STATEMENT.

Introduction

1. By this *Report and Order*, the Commission is amending its rules concerning technical and operating requirements for cable television systems. We hereby change the existing rules into standards. These standards may be applied but not exceeded by franchise authorities in the regulation of the technical quality of Class I (broadcast) channels by cable television systems. Enforce-

ment of all such standards by the Commission is eliminated. The decision as to whether such standards should be used and how they should be administered is left to local and state regulatory authorities. This decision reflects the Commission's belief that in an increasingly competitive marketplace there is a reduced need for detailed regulation of technical quality specifications. The decision, however, leaves local regulatory authorities discretion, in accordance with the provisions of Section 624(e) of the Cable Communications Policy Act of 1984 (1984 Cable Act), to address technical quality issues. Authority of municipal and state regulators to establish requirements for "facilities and equipment" in accordance with Section 624(b) of the Cable Act is unaffected by this decision. Certain changes in the cable television signal leakage rules that were proposed in the *Notice* in this proceeding have not been adopted but will be addressed separately at a later date.

Background

2. The present cable technical rules are set forth in Subpart K of Part 76 of the Commission's rules. These rules were adopted in the *Cable Television Report and Order.*[1] The rules specify numerous technical performance criteria and requirements for annual performance tests. The technical standards contained in Section 76.605 include: 1) the frequency boundaries of cable television channels delivered to subscriber terminals; 2) the frequency tolerance of CATV visual carriers; 3) the frequency tolerance of CATV aural carriers; 4) the minimum visual carrier levels at subscriber terminals; 5) the allowable tolerance for visual carrier level variations within 24 hours; 6) the maximum and minimum aural carrier specifications with respect to visual carrier levels; 7) the maximum allowable level of visual low frequency distortion; 8) the frequency response of each channel; 9) the allowable visual signal-to-system noise level and to any undesired co-channel signal; 10) the allowable level of intermodulation distortion; 11) the minimum amount of isolation between subscriber terminals; and 12) requirements regarding signal leakage.[2]

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[1] 36 FCC 2d 143 1972.

[2] At the time of their adoption in 1972 these standards were referred to as "minimum" standards which caused some confusion at that time and some of that confusion has continued to the present. *See* 49 FCC 2d 470, para. 5 (1974). The standards are minimum in that they describe a level of service that must be delivered to subscribers at even the worst locations on a system. This necessarily means that most subscribers, including in particular those closer to the system headend, will receive service that is superior to this minimum. It

3. In adopting the 1972 rules, the Commission was explicit that its standards were not intended to place any barrier in the way of franchising authorities adopting "more stringent technical standards." *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 359-60 (1972). This policy did not succeed, however, and in 1974, the Commission adopted the current preemption policy.[3] This policy prohibits state and local technical regulations for Class I signals that are inconsistent with those adopted by the Commission.[4] In addition, our preemption policy bars any state and local technical regulation for non-Class I signals. This policy was instituted to ensure the growth of cable services and cable-related technology and to avoid the detrimental impact on cable service and technical innovation in the cable industry that would have resulted from the necessity for system operators and equipment manufacturers having to design and comply with numerous different and potentially conflicting standards.

4. On February 12, 1985, the Commission adopted the *Notice of Proposed Rule Making* in this proceeding.[5] The *Notice* proposed revision of certain rules in Subpart K of Part 76 of the Commission's Rules and Regulations. The *Notice* requested comments on the need for cable television subscriber signal quality standards and on the appropriate level of cable signal leakage limits.

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has also been noted that the standards have been referred to by the Commission itself as incomplete. It was for this reason that the Commission created the Cable Television Technical Advisory Committee in 1972 to provide advice on possible changes to the standards. The work of this Committee led to some changes in the standards. Other changes were not made, however, as it was becoming increasingly clear that the technical interrelationships between the standards involved were extremely complex and that commercial incentives were driving the industry in the same direction as the recommended standards but with both greater force and greater flexibility than could be accomplished with more detailed regulatory requirements. The standards, however, remained valid as a means of defining an acceptable quality of service at the worst subscriber location and thus a better quality of service to the average subscriber. Suggestions that new standards be adopted were received informally in this proceeding. Specific recommendations were not included, however, and this was not, in any case, the focus of this proceeding.

[3] *See Report and Order in Docket 20018*, 49 FCC 2d 470 (October 22, 1974).

[4] Class I channels are television channels received off-the-air or obtained by the cable operator via microwave or direct connection to the television broadcast station. Class II to IV channels are other types of signals that may be provided by a cable system. For example, signals that require an auxiliary decoder, such as most pay cable services, are defined as Class III channels. The Commission's technical performance standards and requirements have traditionally applied only to Class I cable television channels. *See* 47 CFR 76.5(t), (u), (v), and (w).

[5] 50 Fed. Reg. 7801 (February 26, 1985).

5. In response to the *Notice*, the Commission received comments from 50 parties and reply comments from 20 parties. In addition, approximately 70 individual letters were received from cable TV subscribers, amateur radio groups and operators.[6] The vast majority of the letters received were concerned with cable signal leakage requirements.

Discussion

Technical Quality Performance Standards

6. *Federally Enforced Standards.* In the *Notice*, we indicated our belief that competitive forces are sufficient to ensure adequate signal quality for the provision of cable service. Accordingly, we proposed to delete the technical standards for Class I signals from the rules and, alternatively, publish them as guidelines in an Office of Science and Technology bulletin. We indicated in the *Notice* that franchise authorities could use these guidelines in their franchise agreements with the cable operator. We also stated that the imposition of technical quality standards more stringent than those in the guidelines would be considered inconsistent with our national policy and would not be permitted.

7. The National Cable Television Association (NCTA), Capital Cities Cable, Inc., and other cable system operators generally support the proposed elimination of the present signal quality standards for Class I signals. They agree with the Commission that competition from alternate video sources now provide cable operators with sufficient incentives to maintain technical signal quality.

8. Other commenters assert that the market forces do not provide sufficient incentives for cable systems to deliver quality signals. In particular, commenters representing State and local governments argue that cable systems generally have monopoly-like powers, and therefore, cannot be relied upon to ensure satisfactory cable signal performance. The State of Hawaii, for example, expresses concern that cable systems will not maintain acceptable technical quality and reliability unless required to do so. In addition, some commenters, such as the National Association of State Cable Agencies (NASCA), make reference to the recent Commission proceeding that implemented the Cable Com-

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[6] A list of commenters appears in Appendix B.

munications Policy Act of 1984.[7] That proceeding, among other matters, defined effective competition for the purpose of rate regulation of basic cable service, NASCA asserts that the Commission's decision on effective competition should be taken into account in determining whether to deregulate technical standards. Other commenters note that performance would most likely deteriorate in areas where over-the-air reception is already poor.

9. The process of governmental standards setting, in highly complex and evolving fields, carries with it significant risks. Extremely sophisticated economic and technical tradeoffs in a changing environment must be made in order to satisfy consumer demands in an economically sustainable fashion. Standards setting organizations are necessarily removed from this function and react to change in a manner and through processes that invite delay. Nevertheless, there are many areas in which the standard setting function cannot be avoided. In adopting standards in the cable field, the historical records reflects little discussion of whether and in what situations standards could effectively advance the interests of consumers.[8] Recently the Commission recognized that a more rigorous analysis of the area in which it can play a positive role in standard setting is desirable. In addressing this broad general issue in Docket 83-114, the Commission found it useful to focus on four rationales relating to technical standards regulation: 1) interference, 2) spectrum efficiency, 3) interoperability, and 4) technical quality. Interference and spectrum efficiency considerations were judged to warrant the

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[7] *See Report and Order in Docket 84-1296*, 50 Fed. Reg. 18637 (May 2, 1985); *See also* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Sec. 1 *et seq.*, 98 Stat. 2779 (1984).

[8] In the middle 1960s broadcast interests sought the adoption of such standards for a cable industry which, at the time, still operated on a tube rather than transistor technology. See *Notice of Inquiry and Notice of Proposed Rule Making in Docket 15971*, 1 FCC 2d 453, para. 62 (1965). The Commission later declined to adopt specific quality standards, *First Report and Order in Dockets 14895 et al.*, 38 FCC 683, para. 130 (1965), and then in 1968 raised the issue again stating only that such standards should be considered "to further high quality service to the public" and to promote "compatibility among systems for purposes of interconnection." *Notice of Proposed Rule Making in Docket 18397*, 15 FCC 2d 417, para 29 (1968). More specific proposals were made in 1970, again with the statement that the standards would further the quality of service received by the public. *Notice of Proposed Rule Making in Docket 18894*, 25 FCC 2d 38, para 13 (1970). The standards proposed were adopted in 1972 with the sole discussion of their need consisting of a statement that the standards would "provide much needed uniformity on a nationwide basis yet still allow sufficient flexibility for technical change." *Cable Television Report and Order*, 36 FCC 2d 143, para. 149 (1972).

highest priority as to the need for regulatory action. Interoperability was also found to be of high priority, varying, however, depending on the particular service involved. In contrast, technical quality matters were generally found not to require regulation in those services that were considered to be sufficiently competitive.[9]

10. Having reviewed the cable television technical standards against this background and in light of the comments in this proceeding, it is our view that the primary determinants of the quality of service that will be provided are the technical state of the art, the underlying economics of the industry, and the market incentives and competitiveness of the markets involved. The state of the art has clearly advanced to the point where a very high level of service can be provided. The economic situations varies greatly depending on local circumstances, but, if not unduly burdened, an economic base for high quality service appears to exist in all but the more rural areas of the country. And, as we have discussed in other contexts[10], and as Congress has recognized through passage of the 1984 Cable Communications Policy Act of 1984, cable television systems operate in an increasingly competitive environment. Given these factors we are persuaded that in the vast majority of situations the severe penalties that will be imposed in the marketplace for those operations that do not perform satisfactorily far exceed and can safely be used to replace FCC penalities that might be imposed through the regulatory process. Given the authority, described below, that will remain in state and local regulatory authorities to adopt technical standards, we conclude that federally enforced standards are no longer necessary or desirable.

11. *State and Local Standards*. Notwithstanding this decision we continue to believe that there is an important role of the Commission to play in this area. Technical standards that vary from community to community create potentially serious negative consequences for cable system operators and cable consumers in

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[9] *Report and Order in Gen. Docket 83-114*, 99 FCC 2d 903 (1984). The *Report and Order* stated that "the pressure of competition and consumer choice have brought about generally higher level of technical quality than required by our rules." (footnote omitted). It is worth noting in this context that detailed government standard setting efforts in complex technical areas have generally been eschewed even in areas where franchised monopolies are involved. In the telephone industry, for example, the function of setting detailed quality of service specifications has been principally performed by the carriers themselves rather than by governmental agencies.

[10] See e.g., *Report and Order in MM Docket 84-1296*, 50 F.R. 18637 (1985) (Implementation of Cable Act).

terms of the cost of service and the ability of the industry to respond to technological changes. To address this problem, we proposed in the *Notice* to retain technical standards guidelines at the federal level which could be used, but could not be exceeded, in state and local technical quality regulations.

12. In their comments, cable interests asset that the franchising authorities are primed to reinstitute excessive technical standards if the Commission abandons its preemption policy. They note that comments from some franchising authorities which challenged the adequacy of the Commission's current technical standards. The cable operators suggest that such comments are indicative of an inappropriate and excessive regulatory attitude that is prevalent at the local level.

13. Comments filed by local government interest groups oppose Federal preemption of signal quality standards, stating that under the Cable Act, the Commission lacks authority to preempt non-Federal technical regulation. These groups argue that Section 632 of the 1984 Cable Act which authorizes franchising authorities to adopt and enforce customer service provisions and construction-related requirements, implicitly authorized local authorities to adopt non-Federal technical quality standards for cable television.

14. After a receive of the record in this proceeding, we continue to believe that the policy adopted in 1974 was effective, should remain in force, and is entirely consistent with both the specific provisions and the general policy objectives underlying the 1984 Cable Act. This preemption policy has constrained state and local regulation of cable technical performance to Class I channels and has prohibited performance standards more restrictive than those contained in the Commission's rules. The reasons that caused the adoption of this policy appear to be as valid today as they were when the policy was first adopted.

15. The video products that cable systems sell and the processing and transmission equipment used in the construction of cable systems are overwhelmingly associated with national markets that can be severely burdened by disparate and conflicting local regulations and standards. Cable systems now operate in more than 18,500 different communities. There can be no doubt that suppliers of cable service and equipment, in the absence of national standards, face a wide array of different operating requirements. The cost of keeping track of and complying with numerous different requirements is undeniably significant and

there appear to be few if any countervailing benefits associated with such disparate requirements.

16. More important, however, is the potential detrimental impact of such standards on technological innovation in the industry. The problem is not hypothetical. One relatively recent example of the potential problems involved, from our own experience, involved the development of "baseband" cable converters (see note 16 below). Cable systems distribute NTSC picture format video. This format involves a complex interlinking of the various components of the video signal, including the sound, picture, and color components. The baseband technology, which makes possible increased flexibility and security in the delivery of cable services, involves unassembling and reassembling these components in a way that potentially conflicts with traditional standards designed to assure reception of a quality video picture service. The service delivered, however, is of good quality and baseband converters are now being used in connection with many modern high capacity cable systems, notwithstanding that such devices were not developed until the early 1980s. The obstacles that would be created to such innovation were it necessary to win the approval of numerous franchise authorities before use was possible would be most formidable, even if local authorities were equipped to respond to the sophisticated technical issues involved. The possibilities are evident of similar problems being created as efforts are made to improve the quality and fidelity of television through high definition or quasi-high definition techniques, to add greater communications capacity through greater use of subcarriers and the vertical blanking interval, or to develop other innovations. Such obstacles burden the delivery of interstate communications service, are not necessary to the fundamental objectives of local cable franchising, and are inconsistent with the congressional intent that competition in cable communications be promoted and that "unnecessary regulation that would impose an undue economic burden on cable systems" be minimized.[11]

17. Section 624(e) of the 1984 Cable Act appears to specifically anticipate the continuation of our existing policy. It specifies that the "Commission" may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in a franchise." Contrary to the opinions of some commenters, we find nothing in the legislative history that

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[11] Communications Act of 1934, as amended, Section 601(6).

suggests Congress did not approve of the existing policy or that it intended to limit our ability to continue it.[12] The policy is in fact wholly consistent with the Cable Act's intent to establish a national policy that encourages the growth and development of cable television services.[13] The legislative history indicates that franchising authorities are limited to establishing only those standards "which are not inconsistent with standards established by the FCC." On this basis, we believe that Congress intended for the Commission to have authority to oversee technical policy. Further, Congress specifically prohibited local governments from enforcing technical regulations that are inconsistent with Federal Policy.[14]

18. In summary, we find our existing preemption policy has furthered the growth and development of cable television service and should be continued, that nothing in the Cable Act limits our authority with regard to technical regulation of cable systems, and that nothing in the statute or its legislative history indicates that Congress intended to alter our 1974 preemption policy in this area.[15]

Review of Standards

19. Two issues regarding the modified approach to technical deregulation deserve more specific attention. First, a few franchise authorities were exempt from our 1974 preemption policy. That grandfathering provision will continue. Second, for those franchise authorities that want to enforce the Commission's rules and do not have the rules in current franchise agreements, the rules may

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[12] Some commenters asserted that because Section 632 of the Cable Act authorized franchising authorities to adopt and enforce customer service provisions and construction-related requirements, it would implicitly authorize the adoption of non-Federal technical quality standards for cable television. We find nothing in the Cable Act or in its legislative history supporting that assertion. Furthermore, in Docket 20018, the Commission made it clear that the preemptive policy applied only to objective technical standards, i.e., standards that dealt only with shaping amplification, purity, etc., of signals carried in cable system. We have never preempted in such areas of local concern, as studio capacities, electrical safety codes, or construction requirements.

[13] *See* H.R. Report 98-934, 98th Cong., 2d sess. 70 (1984).

[14] It is well established that a clearly articulated policy of deregulation provides a clear basis for federal preemption of inconsistent state regulation. *See, e.g., New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F. 2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1978); *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *recons. denied*, FCC 84-206 (May 14, 1984), *aff'd sub nom New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984). See generally *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982).

[15] *See* 46 FCC 2d 175.

be enforced at franchise renewal time in accordance with the provisions of the Cable Act. Subsequent agreements will have to contain the rules or the rules will not apply. In the interim, the Commission's rule provisions remain a standard that is available to judge the implicit franchise obligation to provide service to the cable consumer that is of acceptable quality. A number of commenters suggested changes to the current technical requirements. After review of the record, we concur that some adjustments to our technical rules is appropriate for Class I signals.

20. The General Electric Co. (GE) and Zenith Electronics Corp. (Zenith), in their comments, suggest a relaxation of the aural center frequency requirement contained in Section 76.605 (a)(3) of the rules. They suggest that the requirement that the aural carrier be 4.5 MHz ±1 kHz above the frequency of the visual carrier should be changed to 4.5 MHz ±5 kHz. GE and Zenith contend that many commercially available baseband converters create potential problems under the existing aural carrier specifications and that such a change would not degrade signal quality at the subscriber's televisions set. We agree with the commenters that this variance could be changed without affecting signal quality. Therefore, we are relaxing the tolerance of the aural center frequency to ±5 kHz.[16]

21. A further review of the current rules focused on the requirement that the aural signal voltage be maintained between 13 and 17 dB below the associated visual signal level, or between 7 and 17 below if there are no immediate first adjacent channel signals. Because the technical standards only apply to Class I, or television broadcast stations, and the Commission, in Docket 83-117[17], eliminated the minimum aural power level requirements for television broadcast stations, the deletion of this provision is appropriate in order to align the cable rules with the broadcast rules on this point. All changes mentioned in the review of standards are reflected in the attached Appendix A.

22. We are also eliminating the measurement and recordkeeping requirements. For example, Section 76.601 sets forth the responsibility of the cable system operator to perform such tests and

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[16] *See Viacom Cable Television of Wisconsin, Inc.*, 50 RR 2d 1558 (1982). In that order the Commission permitted Viacom to use, under certain conditions, decorders in its cable systems which did not meet the standard aural frequency specifications set forth in Section 76.605 (a)(3) of the Rules. This action was taken under Section 76.605(b) of the rules which makes special provision for cable systems "using multiple cable techniques or specialized receiving devices."

[17] 49 Fed. Reg. 22089 (May 25, 1984).

measurements as necessary to offer reasonable assurance that the system performance is continuously satisfactory. While the information required by Section 76.601 may be considered minimal at the start-up of a system, the periodic measurement requirements and bookkeeping, however, can become costly and unnecessary. Therefore, we are deleting these signal quality measurements as federal requirements. However, Section 76.601 also contains requirements for signal leakage tests which, for reasons stated below, we will retain.

Signal Leakage Limitations

23. In the *Notice*, the Commission proposed to relax the signal leakage limits to 50 uV/m at 3 meters in the frequency band 54 to 216 MHz. Response to the *Notice* varied dramatically. Cable operators want futher relaxation of 100 uV/m at 3 meters based on the findings of the Final Report of the Advisory Committee on Cable Signal Leakage (NTIS Pub. PB80-119605). Comments from over-the-air frequency users refute our Part 15 analogy and request no leakage relaxation, stating that there are numerous instances of interference to terrestrial radio facilities at the present levels. Review of the comments does not produce sufficient supportive and conclusive engineering data from either side. Therefore, we will retain the periodic measurement tests for signal leakage and plan to issue a *Further Notice of Proposed Rule Making*, requesting additional engineering monitoring and study.

Regulatory Flexibility Final Analysis

24. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The regulations affected by this decision were drafted in 1972, when the cable industry was in its early stage of development. Since then, the industry has matured and competition has grown for cable. In view of that maturity and competition, this action is appropriate to update the Commission's standards policy and reflect the competition.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

The Initial Regulatory Flexibility Analysis estimated that adoption of the *Notice* in its entirety would save over 51,200 work hours. Although one commenter disagreed with that figure, upon careful review of the information before us we still believe that these savings are an accurate estimate.

III. Significant alternatives considered and rejected:

The Commission considered all of the alternatives raised in this proceeding, including the deletion of all standards, the retention of the existing standards, and the retention of standards only in certain defined circumstances, and it considered all the timely filed comments directed to the various issues in the *Notice*. After carefully weighing all aspects of this proceeding, the Commission has adopted the course of action under the mandate of the Communications Act of 1934, as amended that appears best calculated to eliminate unncessary regulatory requirements, preserve the appropriate role of federal, state, and local regulatory authorities, and promote rapid and efficient communications to the public.

Paperwork Reduction Act Statement

25. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burden upon the public.

Actions

26. The secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, (1981).

27. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and the Cable Communications Policy Act of 1984, Part 76 of the Commission's Rules IS AMENDED as set forth in Appendix A, effective January 23, 1986.

28. Further information on this proceeding may be obtained

from Bernard Gorden or John Wong at 202-632-9660.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

47 CFR Part 76 is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 154, 303, and 601.

2. 47 CFR 76.601 is amended by revising paragraph (b), and removing paragraphs (c), (d), (e), and (f).

Sec. 76.601 Signal Leakage Measurements

(a) * * *

(b) All cable television systems serving 1,000 or more subscribers, and all cable television systems serving less than 1,000 subscribers that use any frequency spectrum other than that allocated to over-the-air broadcasting (as described in Sec. 73.603 and 73.210), shall conduct all tests, measurements and monitoring or radiation and signal leakage to demonstrate compliance with the radiation limits set forth in Sec. 76.605(a)(11) as follows:

(1) The cable system operator shall conduct signal leakage measurements in accordance with Sec. 76.609(h) at least once each calendar year (at intervals not to exceed 14 months) and shall maintain the resulting test data on file at the operator's local business office for at least five (5) years. It shall be made available for inspection by the Commission on request. This data shall include a description of instruments and procedure and a statement of the qualification of the person performing the tests.

(2) Successful completion of the performance tests does not relieve the system of the obligation to comply with all other pertinent technical standards set forth in this subpart. Additional or repeat tests may be required by the Commission in order to secure compliance with these standards.

3. 47 CFR 76.605 is amended by revising paragraph (a)(3), by removing paragraph (a)(6), by redesignating current paragraphs (a)(7) through (a)(12) as new paragraphs (a)(6) through (a)(11) and by adding a NOTE.

Sec. 76.605 Technical standards.

(a) * * *

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(3) The aural center frequency of the aural carrier must be 4.5 MHz ±5 kHz above the frequency of the visual carrier

NOTE: The requirements of Sections 76.605(a)(1) through 76.605(a)(10) do not apply directly to cable systems. These rule sections or less stringent versions of them may be used as standards by state or local regulatory authorities. No technical parameter in excess of the above rule sections may be required.

October 31, 1985

Concurring Statement of Chairman Mark S. Fowler

Re: Signal Quality Rules for Cable Television

The Commission today correctly decided to continue its 1974 preemption of state and local cable signal quality regulations. The possibility of hundreds or even thousands of different standards being adopted by the more than 18,000 cable franchise authorities creates a clear and present danger both to the provision of economically sound interstate cable communications services and to technical progress and innovation from the equipment manufacturing sector. Particularly in times of great technological change and innovation, technical standards may impede such forces. It is also our responsibility at the federal level to ensure that interstate communications is not substantially burdened by a patchwork of different local regulations. This applies both to cable software and hardware.

As to the local standard setting process, even within federal guidelines, I think the fundamental questions still need to be asked. Where is the compelling government interest? Where is the need for signal quality regulation? Where is the record which shows that the marketplace forces will not accomplish the goal at which signal quality regulation is aimed?

Cable operators, like all providers of video services, depend centrally on signal quality to operate successfully. Cable subscribers have direct access, through their monthly subscription payment, to marketplace mechanisms which control cable operators decisions on matters such as signal quality. I am unable to understand how anyone could think government standard setters — with their lack of practical experience in cable construction and maintenance, and inability to react rapidly and flexibly to technological innovations — can or should be setting quality standards, regulating signal quality, or otherwise second-guessing cable subscribers' decisions as to the signal they receive.

Even if such practical expertise existed, there remains unanswered the justification for governmental intervention. That was my view when we eliminated signal quality standards for broadcast signals; we have not observed any deterioration in that instance. That also was my view when we considered mandating cable carriage of stereo sound. The observations in my separate statement in that stereo must-carry case are relevant here as well: this too is "a situation where marketplace forces will accomplish the goals that a prior Commission — with a pro-regulatory philosophy and less understanding of the value of unregulation in fostering the development of telecommunications — would have tried to accomplish by imposing rules." That view does not change just because there are intervening parties — the cities — who don't agree with the marketplace approach to communications regulation being implemented by this Commission and who wish for some reason to reverse the basic proposition that proof of need should precede government regulation of the people's lives and commerce.

Common Carrier Costs, Allocation of
Common Carrier Interconnection, Carrier to Carrier
Common Carrier Rate Structure, Inquiry
Rule Making, Notice of Proposed
Wide Area Telephone Service (WATS)

Notice of Proposed Rulemaking adopted to consider the long-term obligations of exchange carriers under the Communications Act to provide 800 service access to interexchange carriers.
— *Provision for 800 Service*
CC Docket 86-10

FCC 86-27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Provision of Access for 800 Service

CC Docket
No. 86-10
RM 5101

NOTICE OF PROPOSED RULEMAKING

Adopted: January 14, 1986; Released: January 23, 1986

BY THE COMMISSION:

I. Introduction

1. On July 12, 1985, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition (the Petition) asking this Commission to initiate a rulemaking proceeding to consider the obligations of exchange carriers under the Communications Act to provide 800 service access to interexchange carriers (IXCs). Twelve parties filed comments in response to the Petition; seven parties filed reply comments; and Bell Atlantic and GTE Corporation filed further responses to comments on the Petition.[1] By this Notice,

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[1] In this order, we grant motions by Bell Atlantic and GTE Corporation to file

we initiate a rulemaking proceeding on the long-term 800 access obligations of exchange carriers, but deny the Petition with respect to the obligations of exchange carriers in the short-term.

II. Background

A. Current Provision of 800 Service

2. 800 service (or INWATS) is an interexchange service in which the called party, rather than the calling party, subscribes to the service and pays for calls. The service provides businesses and other organizations a means of providing potential customers, or other persons with whom they wish to communicate, a convenient and free method of contacting them. An 800 service subscriber may choose to pay for incoming calls from any telephone in the country or may decide to limit its coverage to telephones in one or more of five concentric geographic bands around the subscriber's receiving location. 800 service is one of the fastest growing telephone services, with revenues that were in excess of $3 billion in 1983 and were increasing at the rate of 15-20% per year.[2]

3. From 1967, when AT&T first introduced 800 service, until 1981, calls were handled by designated originating and terminating switching offices that employed a special 800-NXX routing and screening methodology that would verify that the call originated from a subscribed service area and route the call over the network for completion. The system was quite inflexible because every digit in the 800 number had significance for the screening and routing functions. As a result, subscribers had no choice of 800 numbers and had to use different 800 numbers for interstate and intrastate calls. In addition, any change in the receiving location or in the geographic bands of coverage required a change in the 800 number.

4. In 1981, AT&T began providing 800 service using its Common Channel Interoffice Signaling (CCIS) system and a data base containing 800 service information. Under this system, an 800 call is routed to an Originating Screening Office (OSO). The call is held at the OSO while the 800 number and the 3-digit Numbering Plan Area, or area code, of the call's origin are provided to the 800 service data base through the CCIS signalling system. The data base not only checks to ensure that the call is

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further responses to comments. A list of parties filing pleadings in this proceeding is attached as Appendix A.

[2] Bell Atlantic Petition for Rulemaking at 3.

from a service area for which the subscriber has paid, but also translates the 800 number into a standard ten-digit number, which is returned to the OSO for routing over AT&T's regular network to the subscriber's local exchange carrier for termination over a service-dedicated line.

5. The data base system is a significant improvement over the previous system. A customer may now use a single 800 number for both interstate and intrastate calls and may choose its own 800 number for marketing purposes, such as 800-CLUB-MED. It may retain that number even if it changes its receiving locations or the geographic bands from which 800 calls are authorized. A subscriber may also allocate certain fixed percentages of calls to different receiving locations or even route calls to different receiving locations depending on the originating area or the time of day.

B. Consideration of 800 Access in the Antitrust Proceeding

6. The District Court and the Department of Justice (DOJ) have extensively considered various 800 access issues under the *Modification of Final Judgment* (*MFJ*) and the Plan of Reorganization in the AT&T antitrust proceeding.[3] Most importantly, the Plan provided that the 800 service data base system would belong to AT&T because it performed interexchange, and not exchange access, functions. AT&T must lease access to the system to the Bell Operating Companies (BOCs) for provision of intraLATA 800 service, but it need not allow the BOCs to use the system in a way that allows direct or indirect access by other IXCs (OCCs). The Plan also determined that the 800 prefix is not AT&T's property, so that both the BOCs and the OCCs are entitled to use it for INWATS service. The Plan established as well that the BOCs' Central Staff Organization (now Bell Communications Research, or "Bellcore") will administer the North American Numbering Plan to assign 800 numbers and that 800 directory assistance will be an interexchange, interLATA service and thus beyond the authority of any BOC.

7. In December 1983, DOJ filed a motion asking the Court to grant the BOCs access to AT&T's CCIS data base system so they could route 800 calls for the OCCs while the BOCs develop their

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[3] *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U. S. 1001 (1983) (*MFJ*); *United States v. American Tel. and Tel. Co.*, 569 F. Supp. 1057 (D.D.C.), *aff'd sub nom. California v. United States*, 104 S.Ct. 542 (1983) (approval of Plan of Reorganization).

own data base facilities. DOJ contended that the request amendment of the Plan and temporary waiver of the *MFJ* prohibition against BOC provision of interLATA services were necessary to allow the BOCs to provide equal 800 access to the OCCs and to permit competition to develop in the lucrative 800 market. Otherwise, DOJ contended, the BOCs would be forced to implement a less desirable NXX interim access plan, under which the first three digits of the 800 number would identify the IXC chosen by the subscriber. The DOJ motion was supported by the BOCs and several OCCs, including GTE Sprint, MCI, Western Union, and SBS.

8. In January 1985, the Court denied DOJ's motion.[4] It found that the NXX access plan provided the OCCs with a level of signal quality equivalent to that provided to AT&T and that the NXX plan could be provided with minimal disruption. The Court also found that the NXX plan would not violate the equal access provisions of the decree because the BOCs would provide both AT&T and the OCCs with the identical signal -- the dialed 800 number. The Court further relied on the absence of any contention that the cost to the OCCs of developing their own data bases in the interim would entirely frustrate entry during the interim period or that any delay in the availability of competitive 800 service would preclude long-term competition. The Court noted as well that DOJ's plan might conflict with the Consent Decree by permitting the BOCs to provide interexchange services. The Court did find that the BOCs were entitled to obtain from AT&T the hardware, software, and know-how necessary to develop their own data base system.

C. Current BOC Efforts to Provide 800 Access

9. The BOCs have under development a data base plan for 800 access that would be very similar in certain respects to the CCIS data base system. Under the plan, the BOCs would establish a coordinated system of data bases and signaling system to handle 800 calls. The originating BOC would route an 800 call to one of its Service Switching Points (SSPs), which would query that BOC's data base. At minimum, the data base would inform the SSP which IXC was to carry the call so that the SSP could route the call to the IXC for completion. The BOC data base system also could determine whether the call was from a subscribed area, translate the 800 number to a standard ten-digit number for

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[4] *United States v. American Tel. and Tel. Co.*, 604 F. Supp. 316 (D.D.C. 1985).

further routing, route the call to different IXCs or to different receiving locations based on the time of day or the call's origin, provide automatic least-cost routing, or provide statistical information to subscribers on the nature of their 800 traffic. Thus, like AT&T's data base system, the BOC data base system would allow customers to select a single, verbally significant 800 number and make various changes in service without changing that number. In addition, the BOC data base system would allow a customer to change IXCs or have different IXCs provide service from different locations or at different times of day under a single, nationwide 800 number.

10. The development and implementation of the BOC data base plan will take some time. While estimates vary, it apparently will not be available until late 1987 or even late 1988. As for BOC provision of 800 access in the short term, since the issuance of the Court's decision denying them interim access to AT&T's data base, the BOCs have started updating their equal access compliance plans. Although some initially questioned the wisdom of using the NXX plan for the period preceding implementation of their data base plan, all the BOCs apparently have now agreed to provide that form of access in the short term.

D. 800 Access Issues in OCC Joint Petition

11. On June 17, 1985, GTE Sprint Communications Corporation, US Telecom, Inc., Allnet Communication Services, Inc., and United States Transmission Systems, Inc. (OCC petitioners) filed a joint petition that raised significant questions about access for 800 service (Joint Petition). The petitioners contended that the 800 data base system is an AT&T "monopoly endowment" that threatens effective long-distance competition. As a remedy, they asked that AT&T be required to permit the OCCs access to the 800 data base in order to allow competitive provision of 800 service until the OCCs build their own data bases. The OCC petitioners' primary legal argument was that all ratepayers should be allowed to benefit from the 800 data base because it is a quasi-public asset funded by those ratepayers. AT&T responded that (i) the 800 data base system belongs to AT&T's shareholders and not to ratepayers; (ii) the Commission lacks authority to grant the requested relief because it cannot disturb the District Court's assignment of assets under the *MFJ* and Plan of Reorganization or alter the corporate structure of AT&T; and (iii) granting such access would remove incentives for AT&T and the OCCs to innovate.

12. On November 14, 1985, we adopted a Notice of Proposed Rulemaking in response to the Joint Petition. We there decided to consider the OCC petitioners' request for access to AT&T's 800 service data base in this proceeding.[5]

III. The Long-Term Obligations of Exchange Carriers to Provide 800 Access

13. In its Petition, Bell Atlantic requests that this Commission initiate a rulemaking proceeding to adopt policies or rules on the long-term obligations of exchange carriers to provide 800 access so that there can be a single, nationwide form of 800 access. Such a uniform system of access allegedly is essential to competitive 800 service. Bell Atlantic advocates that this Commission require all exchange carriers to provide 800 access through the BOCs' coordinated data base plan.

A. Comments

14. The following parties, representing a vast majority of those filing comments, favor a rulemaking proceeding on long-term 800 access issues: the Ameritech Operating Companies (Ameritech); BellSouth Corporation; Pacific Bell and Nevada Bell (PacTel); Southwestern Bell Telephone Company (Southwestern Bell); GTE Corporation; Lexitel Corporation; the United Telephone System, Inc. (United Telephone); and US Telecom, Inc. They all agree that express Commission policies are essential to ensure universal, uniform 800 access. Most strongly favor the BOC data base plan. Southwestern Bell and GTE, however, urge us to require only the provision of those aspects of BOC data base access essential to adequate, nondiscriminatory service and to let the market determine the availability of more sophisticated vertical services. United Telephone suggests that this Commission defer any rulemaking proceeding on long-term 800 access until exchange carriers have had a reasonable opportunity to resolve questions about the economics of the BOC data base plan.

15. Only two parties totally oppose a rulemaking proceeding on the form of long-term 800 access — Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company,

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[5] *GTE Sprint Communications Corporation, US Telecom, Inc., Allnet Communications Services, Inc., and United States Transmission Systems, Inc.: Joint Petition for Expedited Rulemaking,* CC Docket No. 85-348, FCC 85-604 (released Dec. 5, 1985) (hereinafter *Joint Petiton NPRM*).

and Pacific Northwest Bell Telephone Company (US West); and American Telephone and Telegraph Company (AT&T). They contend that there is no need for an express Commission policy because the BOCs already are developing a coordinated data base plan that will assure uniformity among the BOCs. US West argues that this Commission should defer action until there is an exchange carrier refusal to connect an interexchange carrier for 800 service. AT&T suggests that CC Docket 78-72, Phase III, is the appropriate forum if consideration of independent exchange carrier obligations to provide 800 access is judged necessary.

B. Discussion

16. By this Notice, we initiate a rulemaking proceeding on the long-term obligations of exchange carriers under the Communications Act to provide access for 800 service to all interexchange carriers requesting such access. We tentatively conclude that a uniform, nationwide system of 800 access is necessary for an economically viable, nationwide 800 service to be offered by multiple interexchange carriers. We also tentatively conclude that the BOC data base plan appears to have substantial benefits for 800 service subscribers. For instance, the plan would allow number portability and a multiple-carrier capability that would enable subscribers to choose different interexchange carriers for calls from different areas or at different times-of-day on one 800 number. In addition, if exchange carriers offered number translation and the ability to screen calls to ensure they are from subscribed areas, small interexchange carriers could provide unadorned, but competitive 800 service without having to invest substantially in their own data bases.

17. We also conclude that the current efforts by the BOCs to develop a coordinated data base plan do not obviate the need for a rulemaking proceeding. First, the BOC data base plan under development potentially offers a wide variety of features, many of which may not be necessary to establish a basic 800 access service. In a rulemaking proceeding, we can consider whether we should specify which features will be mandatory and which optional. Second, a Commission determinaton of how the costs of developing and implementing a data base plan will be recovered would appear to be useful for reasoned decisionmaking by the BOCs in their development efforts. Third, a rulemaking proceeding is necessary to consider how and when the independent exchange carriers should provide 800 access. Their provision of

compatible 800 access would appear to be necessary to ensure that consumers throughout the nation will be able to take advantage of 800 service, and we know of no commitment to provide such access.

18. Although we have tentatively concluded that the BOCs should be required to implement a data base system for 800 access, there are several specific issues that need to be addressed:

(a) whether detailed Commission rules are necessary concerning the implementation of any exchange carrier long-term 800 access obligation under the Communications Act, including a schedule for such implementation;[6]

(b) whether any such obligation should be limited to a simple ten-digit screening of calls for routing to an interexchange carrier selected by the subscriber;

(c) whether exchange carriers should be permitted, or required:

(i) to screen 800 calls to ensure they are from locations for which the subscriber has paid;

(ii) to offer interstate 800 subscribers multiple-carrier capabilities;

(iii) to offer interstate 800 subscribers least-cost routing; and

(iv) to offer 800 number translation capabilities;

(d) What obligations should be imposed on independent exchange carriers to provide 800 access to interexchange carriers, and on what schedule;

(e) the amount of the costs of implementing any mandatory or voluntary 800 access and how they should be recovered from 800 access and any other services to be provided via the data base plan;[7] and

(f) if certain capabilities are held to be optional, how their pricing should be unbundled.

19. We seek comments on these specific issues as well as on the general question of the appropriate long-term obligation of ex-

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[6] At least two sets of comments raise questions about the level of AT&T's cooperation with the BOCs in the development of the BOC data base system. On the assumption that we decide that the BOC data base system should be implemented on a nationwide basis, we invite comments with respect to actions this Commission can and should take in expediting implementation of that system.

[7] For instance, should mandatory 800 access costs be recovered from all interexchange carriers or only those carriers offering 800 service? Should AT&T be exempted, either wholly or partially, on the grounds that it already has developed its own 800 data base system? Persons who comment on this question are encouraged to suggest amendments to the Part 69 access charge rules that would implement a decision to recover 800 access costs in a particular manner.

change carriers to provide 800 access. Finally, we invite comment on whether any of the proposals under consideration might conflict with the *MFJ*.

IV. Denial of Bell Atlantic's Petition With Respect to Interim 800 Access

20. With respect to interim 800 access, Bell Atlantic urges us to initiate a rulemaking proceeding because, it alleges, "there is disagreement over the need to offer interim short-term access and, if there is such a need, how that access should be provided."[8] Bell Atlantic advocates that we decide in such a rulemaking proceeding that the Communications Act permits exchange carriers to forgo providing interim access in order to devote their resources to rapid implementation of the BOC data base plan. Bell Atlantic further argues that if we conclude that interim 800 access is nevertheless necessary, we order AT&T to make its 800 data base system available to the BOCs for that purpose and allow Bell Atlantic to recover its costs from all interexchange carriers that avail themselves of 800 access.

A. Comments

21. Seven commenters favor such a rulemaking proceeding: BellSouth, PacTel, Southwestern Bell, GTE, Lexitel, US Telecom, and United Telephone. In summary, they argue that this Commission needs to resolve the current controversy about exchange carriers' interim 800 access obligations to ensure that such access, if provided, is uniform and universal.

22. MCI and SBS both urge that action on interim access be deferred until DOJ reaches a conclusion concerning the BOCs' interim access obligations under the *MFJ*. Both contend, however, that some form of interim 800 access is essential and recommend that this Commission use the OCCs' Joint Petition, if necessary, to ensure that access is provided.

23. AT&T and US West oppose a rulemaking proceeding on the interim 800 access obligations of exchange carriers. AT&T argues that the District Court already has decided that exchange carriers have duties under the *MFJ* to provide interim 800 access and to use the NXX plan, and that this Commission has no authority to grant any relief from those obligations. Several parties, including Bell Atlantic, PacTel, US West, GTE, Lexitel, and SBS, appear to

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[8] Bell Atlantic Petition for Rulemaking at 1.

contest AT&T's interpretation of the *MFJ* and the Court's decision on DOJ's motion on interim 800 access and argue generally that it does not legally restrict this Commission's options under the Communications Act. US West argues that a rulemaking proceeding is unnecessary because implementation of interim NXX access is underway and because questions concerning cost recovery can be addressed during review of its NXX access tariff filing.

24. The parties disagree about whether there should be any interim access. Bell Atlantic, BellSouth, PacTel, and US Telecom all argue there should be no interim access. They claim it will divert significant resources from development of the data base plan and thus substantially delay its implementation. United Telephone similarly argues that it, as an independent exchange carrier, should have no interim access obligation because such access would be costly and burdensome and of dubious benefit given the limited OCC presence in United Telephone areas. By contrast, AT&T, Ameritech, Southwestern Bell, US West, MCI, and SBS contend that interim service (in the form of the NXX plan) can be implemented relatively quickly and inexpensively. GTE argues that NXX access will be costly, but that some form of interim access is necessary because the BOC data base plan will not be available until late 1988.

25. The parties also disagree about Bell Atlantic's request in the alternative that, if there is to be interim access, this Commission require AT&T to allow use of its 800 data base system. Only Lexitel and US Telecom join in this request. GTE advocates that we order that the data base be used to sort calls among interexchange carriers, but that no number translation or time-of-day routing be allowed. GTE asserts that such a limited order would avoid problems under the *MFJ*, speed the availability of interim service, and make it less expensive. AT&T argues that the District Court's ruling prohibits BOC use of the data base for interim 800 access. AT&T, Ameritech, and US West contend that interim use of the data base is not feasible at this point because it would take too long to implement.

26. On the question of pricing, Bell Atlantic asks that costs be recovered from all IXCs requesting 800 access (presumably including AT&T) on a traffic-sensitive basis. Southwestern Bell and US West state that they plan to recover their costs from all IXCs through cost-based access charges, with no discounts. MCI and GTE urge that the OCCs be given a discount if interim

NXX access is provided because that access is inferior to that provided AT&T.

27. In further responses, Bell Atlantic and GTE state that they have decided to provide interim NXX access. They both still urge the Commission to initiate a rulemaking proceeding to ensure the universal availability of interim 800 access.

B. Discussion

28. We have decided that a rulemaking proceeding on interim 800 access is unnecessary. The question of interim 800 access has been extensively considered in the antitrust proceeding since December 1983. We understand that the BOCs, including Bell Atlantic, have recently informed the DOJ that they will provide interim 800 access under the NXX plan. GTE also will be providing interim NXX access. The record before us indicates that the NXX access plan should be able to provide relatively quick and inexpensive 800 access. By contrast, it is unclear that access to the AT&T data base system could be implemented significantly before implementation of a long-term access plan. We see little, if anything, to be gained by commencing a rulemaking proceeding on interim 800 access that may in itself inhibit the provision of any form of interim 800 access to the OCCs.[9]

29. We also deny Bell Atlantic's request that we initiate a rulemaking proceeding to decide how the costs of providing interim 800 access should be recovered. Bell Atlantic has estimated that its costs to provide NXX access will amount only to $3 million. Southwestern Bell has stated that implementation of NXX access will not require significant resources. US West has represented that tariffs for such cost recovery will be filed

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[9] We also reject the OCCs' argument that they should be granted interim access to AT&T's 800 data base on the grounds that it is a quasi-public monopoly endowment. In the *Joint Petition NPRM*, we rejected the "monopoly endowments" argument as applied to the joint petitioners' request for access to AT&T's advanced operating systems for automated credit card service, 900 service, and interLATA coin-sent paid service. We reasoned that this argument, if unqualified, proves too much because it would appear to entitle the OCCs to access to virtually all of AT&T's corporate property. In addition, it is not clear under this argument when AT&T's development efforts ceased being quasi-public in character. Because AT&T is still subject to rate regulation, the argument might even require OCC access to systems currently under development. *Joint Petition NPRM* at para. 55 n.50. Thus, we here reaffirm our decision not to accept the argument that the OCCs should be permitted unfettered access to those systems simply because AT&T developed certain operating systems in a less competitive environment than prevails today.

shortly. The Part 69 access charge rules apportion all exchange carrier interstate costs, including costs that may not have been anticipated at the time those rules were adopted, among the access elements and the interexchange category. The petition and comments do not demonstrate that application of the present access charge rules to the costs of providing interim 800 access will produce any significant distortion that would warrant changes in those rules.[10]

V. Ordering Clauses

30. Accordingly, IT IS HEREBY ORDERED That the Petition for Rulemaking requested by Bell Atlantic IS GRANTED to the extent indicated herein and otherwise DENIED.

31. IT IS FURTHER ORDERED That the requests concerning AT&T's 800 service data base system in the Joint Petition for Expedited Rulemaking filed by GTE Sprint Communications Corp., US Telecom, Inc., Allnet Communication Services, Inc., and United States Transmission Systems, Inc. (RM 5057) are DENIED.

32. Accordingly, IT IS ORDERED That pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on the actions proposed in this Notice on or before March 4, 1986, and reply comments on or before April 1, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this

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[10] On December 31, 1985, US West filed a petition with us seeking waiver of certain sections of Part 69 of our rules to the extent necessary to allow the introduction of a separate rate element for recovery of the costs incurred in the provision of exchange access for 800 service. We have not considered in this proceeding, and express no opinion on, the propriety of permitting an exchange carrier to employ a separate rate element for recovering the costs of providing interim NXX access.

We decline as well to initiate a rulemaking proceeding solely to consider the interim 800 access obligations of independent exchange carriers not a party to the AT&T antitrust proceeding. GTE will be providing interim NXX access. We understand as well that many independent exchange carriers now use the BOCs to route their originating 800 calls and thus presumably will provide interim access through the BOCs' NXX system. Other independent exchange carriers may find it in their economic interest to provide interim 800 access through their own implementation of the NXX system. We therefore conclude that a rulemaking proceeding on the interim access obligations of independent exchange carriers is not likely to increase the availability of 800 access significantly beyond that which would otherwise occur during the transition to implementation of a data base plan.

proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Room 222, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

33. IT IS FURTHER ORDERED That the motions by Bell Atlantic and GTE Corporation to file further responses to comments ARE GRANTED.

34. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting, or until a final order disposing of the matter is adopted by the Commission, whichever comes earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff that addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates.

35. IT IS FURTHER ORDERED That the Secretary of the Federal Communications Commission shall effect publication of

this Notice of Proposed Rulemaking in the Federal Register.[11]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[11] The provisions of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12, are not applicable to this proceeding. This Commission has found that local exchange carriers, the parties directly subject to our access rules, do not come within the Act's definition of a "small entity." *Id.* § 601; *see MTS/WATS Market Structure*, 93 F.C.C.2d 241, at paras. 358-62 (1983).

Diversification
Lottery, Licensing by
Ownership, Diversification of
Preference

Commission determines that it does not have authority under section 309(i) of the Act, 47 U.S.C. Sec.309(i), or residual discretion under Title III, to award preferences to female applicants when first-time licensees in mass media services are selected by lottery.
— *Random Selection/Lottery Systems*
Gen. Docket 81-768

FCC 85-453

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings	Gen. Docket No. 81-768

THIRD REPORT AND ORDER

Adopted: August 7, 1985; Released August 16, 1985

BY THE COMMISSION: COMMISSIONER DAWSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

1. In our *Third Notice of Proposed Rule Making* in General Docket No. 81-768,[1] we initiated a proceeding to determine whether women as a group should be granted preferences when initial licensing proceedings in the mass media services are

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[1] 95 FCC 2d 432 (1983) (hereinafter "*Third Notice*").

conducted by lottery pursuant to section 309(i) of the Communications Act, 47 U.S.C. § 309(i). As discussed more fully below, we conclude that the amended lottery statute does not give the Commission the authority to grant women a "minority ownership" preference by including them in the definition of "minority group" set out at section 309(i)(3)(C)(ii) of the Act. Nor, we believe, does the statute give the Commission authority to grant women a "media ownership" preference since eligibility for that preference is based solely upon the number and location of other mass media properties owned by the applicant. Finally, we conclude that we do not have residual authority to create a special lottery preference for women in addition to the "minority ownership" and "media ownership" preferences.

Background

2. The history of the Commission's efforts to implement a workable lottery system under section 309(i) of the Act is set forth in detail in the *Third Notice*.[2] Briefly, however, the Commission first received explicit statutory authority to use a lottery as a means of allocating licenses to use the electromagnetic spectrum in Pub. L. No. 97-35, the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 357 (1981), which added subsection 309(i) to the Communications Act. The new statute authorized the Commission, at its discretion, to grant licenses or construction permits for any use of the spectrum to a qualified applicant by use of a lottery system. In a new section 309(i)(3)(A) to the Communications Act, Congress directed the Commission to

> . . . establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection, groups or organizations, or members of groups or organizations, which are underrepresented in the ownership of telecommunications facilities or properties will be granted significant preferences.[3]

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[2] *See* 95 FCC 2d at 432-35.

[3] The *Conference Report* explained the purpose for the system of lottery preferences as follows:

> It is the firm intention of the conferees that ownership by minorities, such as blacks and hispanics, *as well as by women*, and ownership by other underrepresented groups, such as labor unions and community organizations, is to be encouraged through the award of significant preferences in any such random selection proceeding. These are groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees in establishing a random selection process that the objective of increasing the number of media outlets owned by such persons or groups be met. [emphasis added]

In large part due to the lack of specificity about which groups would be eligible for preferences under the statute, the Commission was unable to exercise its statutory authority and requested additional congressional guidance in effecting the statutory lottery preference scheme.[4]

3. Congress gave the Commission "the additional guidance and clarification it said it needed" by enacting Section 115 of the Communications Amendments Act of 1982.[5] In a new subsection 309(i)(c)(C)(ii), Congress provided that:

> The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

In addition, amended section 309(i)(3)(A) directed that

> . . . significant preferences will be granted to applications or groups of applications, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

4. The Commission's *Second Report and Order*[6] adopted rules implementing this amended lottery authority and granted a "minority ownership" preference to those named groups listed in the statutory definition of "minority" and a "media ownership" preference to those applicants owning no or few other media of mass communications.[7]

H.R. Rep. No. 97-208, 97th Cong., 1st Sess. (1981), at 897 (hereinafter "*1981 Conference Report*"). Given this expression of Congressional intent, the Commission's first *Notice* in this proceeding included women in the list of groups to be awarded a preference in relevant lottery proceedings. *See Amendment of Part 1 of the Commission's Rules to Allow the Selection From Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Proceedings*, 88 FCC 2d 476, 484-485 (1981) (hereinafter "*First Notice*"). However, practically every aspect of the proposed lottery structure became the object of substantial dispute among the commenters.

[4] *Report and Order,* 89 FCC 2d 257 (1982) (hereinafter "*First Report and Order*").

[5] Pub. L. No. 97-259, which amended section 309(i)(3)(A) of the lottery statute and added a new subsection 309(i)(3)(C)(ii). *See* H.R. Rep. No. 97-765, 97th Cong., 2d Sess. (1982) at 24. (hereinafter "*1982 Conference Report*")

[6] 93 FCC 2d 952 (1983), *recon. in part,* 49 Fed. Reg. 49466 (Dec. 20, 1984) ("*Lottery Reconsideration Order*"), *appeal docketed sub nom. National Latino Media Coalition v. FCC,* No. 83-1785, (D.C. Cir. July 26, 1983).

[7] 93 FCC 2d at 953.

5. Because the appropriateness of granting preferences to women under the amended lottery statute was a matter of some dispute, the Commission issued a *Third Notice* in this docket to resolve that issue. In the *Third Notice* we observed that the statutory lottery preferences available to an applicant under the amended statute appeared to be predicated on two standards — first, the number of other media outlets owned and, second, the racial or ethnic origin of the applicant. However, we also raised the possibility that the following language in the *1982 Conference Report* might indicate the conferees' intent for women as well to be eligible for a lottery preference:

> It should be noted that such groups as women, labor unions, and community organizations which are mentioned in the legislative history of the lottery statute that was originally adopted ... are all significantly underrepresented in the ownership of telecommunications facilities. Such applicant groups would, of course, be eligible for both media ownership and minority preferences if they meet the eligibility guidelines. The Conferees expect that such groups will also substantially benefit from this lottery preference scheme . . .[8]

6. We also noted that language in the *1982 Conference Report* indicated that the scheme of lottery preferences was to some extent intended to substitute for the Commission's comparative licensing proceedings in which the Commission awarded "significant comparative advantages" to "minority-controlled applicants and to applicants with a low degree of ownership interest in mass communications media."[9] We asked whether Congress intended to grant women as a class a comparable preference under the lottery scheme similar to that awarded under the integration of ownership and management criterion of the Commission's comparative licensing process.

7. We suggested that two avenues might be available under the statute for providing women a preference: (1) to amend the lottery rules to treat women as a "minority group" for purposes of the statutory "minority ownership" preference, or (2) to accord women as a class a preference under the diversification ("media ownership") preference.

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[8] *1982 Conference Report* at 44–45.

[9] *Id.* at 40. The conferees observed that "the degree of advantage, merit, or preference heretofore awarded to such applicants need not be precisely duplicated in the administration of a random selection system." *Id.*

8. Assuming the Commission had authority to grant women a preference under either approach, we also requested comment on whether the Commission is itself competent to make findings that women have been discriminated against in the ownership of mass communications media or whether Congressional action is instead required. We observed that while the Commission previously has found that women as a class have been historically discriminated against in employment,[10] and a study recently conducted for the Commission, which was designed to identify the extent of women's ownership of broadcast facilities suggested there was a disproportionately low level of women's ownership,[11] no such record apparently existed in this proceeding for establishing a nexus between discrimination and women's ownership of broadcast facilities. We requested comment on whether the study's results constituted adequate legal and factual grounds upon which to grant a preference.

9. Fourteen parties filed comments or reply comments in response to the *Third Notice*.[12] In addition, letters were received from Sen. Robert Packwood, Rep. Olympia J. Snowe, and Rep. Nancy L. Johnson. The congressional letters supported the inclusion of women within the enumerated groups accorded "minority" preference under the statute. AAUW, AWRT, NOW-LEDF, NRBA, and Pappas filed comments which supported granting women both "minority" and "media ownership" prefer-

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[10] *Equal Employment Program,* 32 FCC 2d 708, 709 (1971).

[11] *Female Ownership of Broadcast Stations,* ELRA Group, Inc., May 1982. In the event we determined that we do not have jurisdiction to establish a preference of women, we proposed to forward to the Congress documents reflecting the record developed in response to the *Third Notice,* together with such recommendations as were found appropriate. By direction of the Commission, the Secretary sent a letter to Sen. Robert Packwood, Chairman of the Senate Committee on Commerce, Science and Transportation, informing him of the issues raised by the *Third Notice* and the pendancy of this proceeding. A similar letter was sent to Sen. Ernest F. Hollings.

[12] Comments were filed by: American Association of University Women ("AAUW"), American Christian Television System, Inc. ("ACTS"); American Legal Foundation ("ALF"); American Women in Radio and Television ("AWRT"); four students at Howard University School of Law ("Howard students"); National Association of Black Owned Broadcasters ("NABOB")' National Black Media Coalition ("NBMC"); National Radio Broadcasters Association ("NRBA"); NOW Legal Defense and Education Fund ("NOW-LEDF"); Mrs. Stella A. Pappas ("Pappas"); and James U. Steele ("Steele"). Reply comments were filed by: ACTS; Citizens Communications Center and Black Citizens for a Fair Media ("Citizens and BCFM"); National Conference of Black Lawyers, Communications Task Force ("NCBL"); and Office of Communications, United Church of Christ ("UCC"). These comments are summarized in Appendix B.

ences. ACTS, ALF, Citizens and BCFM, Howard students, Steele, NCBL and UCC filed comments opposing granting women either “minority” or “media ownership” diversification preferences.

DISCUSSION

10. The principal questions raised by our *Third Notice* are whether it is appropriate and within the Commission’s authority to amend its rules implementing the lottery statute to grant women a preference either under the “minority ownership” classification or under the “media ownership” diversification preference. If neither of these alternatives is within the Commission’s authority, we additionally asked whether it would be to create a special lottery preference for women in addition to the statutory “minority ownership” and “media ownership” preferences. As discussed below, we answer no to all three alternatives.

A. Eligibility of women for “minority ownership” diversification preference

11. In our *Third Notice* we observed that the literal language of the amended statute enumerates specific groups which are “included” in the class of “minority group”, but that the language does not mention “women.” We also noted that the term “includes” usually is a term of enlargement, not of limitation, intended to convey that other things are “includable” along with, rather than exhausted by, the enumerated particulars.[13] As the term “minority” is not generally viewed as encompassing women, we asked whether a proposed amendment to the Commission’s lottery rules which construed the term “minority group” to include women was authorized under the statute.

12. Nine commenters supported an amendment to the rules to include women in the “minority ownership” preference. Generally, the commenters argued that while various specific minority groups are mentioned in Section 309(i)(3)(C)(ii), Congress did not preclude the Commission from exercising its judgment in awarding preferences to other groups, such as women, which are similarly underrepresented in the ownership of mass media. The commenters also argued that under general rules of statutory interpretation, use of the term “includes” is permissive rather than restrictive.

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[13] *See* 2A Sands, *Sutherland on Statutes and Statutory Construction* § 47.17 at p. 103 (4th ed.); *Highway City Freight Drivers v. Gordon*, 576 F.2d 1285, 1289, *cert. denied*, 439 U.S. 1001 (1978).

13. Twelve commenters opposed the inclusion of women within those eligible for "minority group" preferences, asserting to include women in the definition of "minority group" adopted by Congress. Opposing commenters argued that Congress made specific determinations as to past discrimination in the ownership of mass media only with respect to racial and ethnic minorities, and created the narrowly drawn "minority group" preference scheme in the amended legislation specifically to remedy the effects of that past discrimination. The commenters maintained that it is not within the Commission's authority under the lottery statute to dilute the "significant preferences" established by Congress for racial and ethnic minorities by including women, a group which was not found by the legislators as having endured the same discriminatory effects. The commenters added that the conferees referenced the Office of Management and Budget's Statistical Policy Directive No. 15, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting" and directed that it be used to resolve disputes on the application of the term "minority."[14] That OMB document, commenters asserted, does not define women to be a minority group. The commenters also pointed out that in 1981, the conferees expressly stated that both minorities and women were entitled to preferences under the initial lottery statute, but this language was dropped from the *1982 Conference Report* where women were instead described as eligible for the same preferences under the statute as labor unions and community organizations.

14. Our examination of the statute leads us to conclude that the "minority ownership" diversification preference was intended by Congress to be limited solely to racial and ethnic minority groups and that women are not includable. Section 309(i)(3)(C)(ii) indicates that "Blacks, Hispanics, Amercian Indians, Alaska Natives, Asians, and Pacific Islanders" are "included" within the class of "minority group." We agree with commenters favoring the inclusion of women in this preference group that the word "includes" is a term of expansion which indicates that minority groups other than those specified are "includable." We do not find, however, that women as a class are sufficiently like the enumerated groups to be includable in the term "minority group." Women are in each one of these groups; however, they do not themselves constitute a separate minority group as we understand the term.

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[14] *1982 Conference Report* at 45.

15. In common language usage, when a list of particulars is associated with a general reference such as "includes," what is intended to be incorporated are those things not mentioned which have significant qualities in common with the enumerated categories.[15] The named particulars in section 309(i)(3)(C)(ii) are all commonly understood to represent terms identifying an individual's racial or ethnic ancestry. Accordingly, we find that the word "includes" in the context of section 309(i)(3)(C)(ii) should properly reference only those persons belonging to racial or ethnic groups not enumerated, or those persons belonging to a class of mixed racial and/or ethnic origins. Women as a class do not fit into either or these groups and thus are not "included." This interpretation accords not only with applicable cannons of statutory construction but also with a reasonable reading of the explicit intent of the conferees.

16. This conclusion is reinforced by a review of the history of the lottery statute. In 1981, Commission found it could not implement the first lottery statute in large part because of confusion about who should be eligible for a minority preference. It consequently requested Congress to provide "specificity" on that issue, and Congress responded by enacting section 309(i)(3)(C)(ii), which listed specific groups to be awarded a minority preference. The fact that Congress had indicated women should be among those to be awarded preferences in the first lottery statute[16] and then, in its 1982 clarification, Congress did not include women, leads to a strong inference that Congress did not intend to extend preferences to women in the amended lottery statute. This is confirmed by the fact that the *1982 Conference Report* expressly referred to its prior discussion of women in the *1981 Conference Report* and concluded that women "would, of course, be eligible for both media ownership and minority ownership preferences if they meet the eligibility guidelines."[17] Thus, in giving the Commission specifically, Congress limited the minority preference to traditionally recognized minorities, intending that women were to receive preferences only to the extent they were part of those cognizable groups.

17. Further support for this is found in the *1982 Conference Report* at 43, which describes application of the "minority ownership" preference exclusively in terms of "*racial* and *ethnic*

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[15] *See 2A Sands, Sutherland on Statutes and Statutory Construction* (Sutherland, 4th ed.), at § 48.18.

[16] *1981 Conference Report, supra* n. 3.

[17] *See 1982 Conference Report* at 44–45.

minorities — groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties." (emphasis added). Indeed, Congress expressly stated that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications . . ."[18] Moreover, the conferees specifically directed reference to the Office of Mangement and Budget's Statistical Policy Directive No. 15 for purposes of defining those eligible for the minority group preference.[19] This document neither enumerates nor otherwise mentions women as a minority group. This bears out the correctness of NBMC's argument that, since women are not defined in any federal statute as a "minority" had Congress intended for women to be included in section 309(i)(3)(c)(ii) as a "minority group," it would have explicity so stated in the amended statute. Morever, as many commenters pointed out,[20] to include so large a group as women as a minority would substantially dilute the preferences to the groups identified by Congress and would be contrary to the congressional intent. For all these reasons, we conclude that Congress intended to limit the eligibility for the "minority ownership" preference solely to racial and ethnic minorities and that including women in this preference is not within our authority under the lottery statue.

B. Eligibility of women for the "media ownership" preference

18. We turn next to the issue of whether the Commission has the authority under the statute to include women in the "media ownership" preference. The language of section 309(i) does not on its face contemplate any preference for women.[21] The *1982 Conference Report*, however, provides explicit instructions for administering the "media ownership" preference. These directives lead us to conclude that Congress intended that eligibility for the "media ownership" preference be based soley upon structural

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[18] *1982 Conference Report* at 43.

[19] *Id.* at 45.

[20] *See, e.g.*, comments of ACTS, ALF, Howard students, NABOB, NBMC, Steele, BCFM, NCBL, and UCC.

[21] The language of section 309(i)(3)(A) reads: The Commission shall establish rules and procedures to ensure that, in the administration of any system or random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications.

criteria — specifically, the *number* and *location* of other media of mass communications properties owned by the prospective applicant. We therefore conclude that we do not have the authority to grant "media ownership" preferences based on any other factor, such as gender.

19. The *1982 Conference Repoort* establishes the criteria to be considered by the Commission in its implementation of the "media ownership" lottery preference:

> [T]he Conferees intend that in the administration of a lottery to be used for granting licenses or construction permits for any media of mass communications, the Commission award a significant media ownership preference to those applicants whose owners control no other media of mass communications . . . Similarly, a mass ownership preference should be awarded to those applicants whose owners, when aggregated, have controlling interest (over 50%) in 1, 2, or 3 other media of mass communications . . . No media ownership preference should be awarded to applicants whose owners, when aggregated, have controlling interest (over 50%) in more than 3 other media of mass communications properties . . . . [N]o media ownership preference should be awarded to any applicant whose owners, when aggregated, have controlling interest (over 50 percent) in any medium of mass communications which is licensed to serve, franchised to serve (in the case of a cable television system), or primarily serves (in the case of a daily newspaper) the community of license for which of [sic] the grant is sought.[22]

These explicit directives lead us to agree with ACTS' comments that it was Congress' intent to base eligibility for the "media ownership" diversification preference solely on the number of other mass media outlets owned by the applicant nationally, irrespective of the race, ethnicity, sex or other characteristic of the applicant.[23]

20. This conclusion is bolstered by language in the *1982 Conference Report* declaring the conferees' "firm intent" for the Commission to preserve in the "media ownership" preference the traditional advantages accorded by the Commission's comparative process.[24] In the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) ("*1965 Policy State-*

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[22] *1982 Conference Report* at 42-43. The specificity Congress employed here is again in response to the difficulty the Commission encountered in implementing the broader 1981 statute.

[23] Indeed, inclusion of women under this preference would lead to the anomalous result of granting women a preference even in the situation where a female applicant was the licensee of a broadcast facility in the very community applied for, a result directly in conflict with Congress' intent to deny a media ownership preference to any applicant already licensed in the same community.

[24] *See 1982 Conference Report* at 39.

ment"), cited by the conferees, a comparative advantage for "diversification of control of the media of mass communications" is awarded only to entities controlled by those with few or no other interests in other mass media.[25] And in proceedings to select from among new competing applicants, the Commission has steadfastly confined its selection process under the diversification factor to this purely structural approach. *See Radio Jonesboro, Inc.* FCC 85-7 at 8 (released April 5, 1985), *appeal pending sub nom. Whispering Sounds, Inc. v. FCC*, No. 85-1277 (D.C. Cir. filed May 6, 1985); *Las Missiones de Bejan Television Co.*, 93 FCC 2d 191 (Rev. Bd. 1983), *review denied* FCC 84-97 (released May 16, 1984) *appeal pending*, No. 84-1255 (D.C. Cir. filed June 18, 1984). For these reasons, we find that we do not have authority to expand the "media ownership" diversification preference to include a further preference for women.

C. Commission's residual authority to create a special lottery preference for women

21. Our *Third Notice* also solicited comment on whether the lottery amendments, by their own terms or intent, would prohibit the Commission from exercising its residual jurisdiction under Title III of the Communications Act to create for women a preference beyond the "media ownership" and "minority ownership" preferences discussed in the *1982 Conference Report*. In this regard, we asked whether creation of a lottery preference for women analogous to the "minority ownership" preference was consistent with congressional intent that the lottery preference scheme reflect the traditional criteria used by the Commission in the comparative licensing process.[26] Noting that in comparative hearings the Commission traditionally has awarded an enhancement credit for female ownership and participation in management, we asked in the *Third Notice* whether the failure to provide a preference or other special consideration for applicants with significant female ownership involvement would situate such applicants substantially differently in the lottery context than would be the case in a traditional comparative proceeding and, if so, whether that would be contrary to congressional intent.

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[25] 1 FCC 2d at 394-95.

[26] The conferees indicated that the lottery preference scheme was to some degree intended to substitute for the "significant comparative advantages" provided in the Commission's comparative broadcasting license proceedings although "the degree of advantage, merit, or preference awarded to such applicants need not be precisely duplicated . . ." *1982 Conference Report* at 40.

22. After examining the preference scheme established by the amended lottery statute, the legislative history, and the comments submitted in response to our *Third Notice*, we now conclude that the lottery statute does not afford us the authority to create an additional lottery preference for women tantamount to the "minority ownership" and "media ownership" preferences estblished by Congress. We believe ACTS is correct in its assertion that while the Commission has authority under the statute to administer lotteries, this authority does not enable the Commission to adopt rules that alter the specific preferences established by Congress. In our reading of section 309(i), in addition to determining which additional racial and ethnic groups may be includable in the "minority ownership" preference, the other area of discretion accorded the Commission is in determining those proceedings to which the lottery system shall apply.[27] As discussed above, we have concluded that the preference scheme established by Congress does not permit the Commission to include women in either the "minority ownership" or "media ownership" preferences. Further, it seems apparent that adopting a preference for women would disrupt Congress' explicit plan for Commission administration of fixed, congressionally mandated "media ownership" and "minority ownership" preference factors by diluting the selection probabilities, intended by Congress to be "highly outcome oriented" for applicants who met the specific eligibility guidelines.[28] We thus find no indication that Congress intended to leave us any discretion to create additional lottery preferences.[29]

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[27] *See 1982 Conference Report* at 37–39.

[28] These fixed relative preferences for eligible applicants are detailed in the *1982 Conference Report* at 46–49.

[29] In contrast, we have previously found that our residual discretion to act in the public interest arises in those circumstances where the lottery statute is not intended to apply. In the *Lottery Reconsideration Order*, *supra* n.6, we determined that the amended lottery statute was not intended to apply to the deadlock or tie-breaker situation. We came to this decision after reasoning that the systematic use of lotteries for certain specific services in the mass media, common carrier and private radio areas as a substitute for comparative hearings was in sharp contrast to the occasional *ad hoc* use of lotteries as an instrument of last resort to resolve a comparative hearing after there is a finding on the record that there are no material differences between the applicants. Without apparent authority under the new legislation to conduct a lottery in a tie-breaker situation, we raised the question whether our general public interest discretion supports such use. Answering that question in the affirmative, we found that tie-breaker lotteries would be a fair and reasonable decisionmaking device if the applicants were in true equipoise on comparative factors. We note that petitions for reconsideration of this order are still pending.

23. Several commenters maintained that incorporation of a preference for women is mandated because Congress intended for the preference system to reflect the Commission's comparative process and because Congress was well aware of the Commission's treatment of women as a minority group at the time it enacted that legislation.[30] Indeed, many commenters supporting the creation of a "women's preference" pointed to language in the *1982 Conference Report* which, in their opinion, indicated Congress' intent for women to benefit from the lottery preference scheme. These commenters rely on the following language:

> It should be noted that such groups as women, labor unions, and community organizations which were mentioned in the legislative history of the lottery statute that was originally adopted [citation omitted] are all significantly underrepresented in the ownership of telecommunications facilities. Such applicant groups would, of course, be eligible for both media ownership and minority ownership preferences if they meet the eligibility guidelines. The Conferees expect that such groups will also substantially benefit from this lottery preference scheme, and, consequently, the American public will benefit by having access to a wider diversity of information sources.

1982 Conference Report at 44–45. We believe, however, as indicated above in para. 16, that the most reasonable interpretation of this language is that Congress intended for women, as well as labor unions and community groups, to participate in the preference scheme only to the extent that they met the "minority ownership" and "media ownership" eligibility guidelines. This interpretation reconciles the old and the new lottery statute. As commenters pointed out, a reading of the initial and amended statutes, as amplified by the explanations provided in the 1981 and 1982 *Conference Reports*, indicate that Congress expressed its intention to award both minorities and women preferences in the initial statute but that under the amended statute, the conferees intended for women to be treated similarly to groups such as labor unions and community organizations, which are also not granted statutory preferences. To include women as a third category eligible for a preference would, in our view, be expressly contrary to Congress' specific decision not to include women as eligible for a special preference.

D. Conclusion

24. For the reasons discussed above, our interpretation of the *1982 Conference Report* leads us to conclude that the Commission

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[30] *See, e.g.*, comments of AWRT and AAUW.

does not have authority under the amended statute to make women eligible for either a "media ownership" or "minority ownership" preference in awarding initial licenses through lotteries. Our interpretation of the *1982 Conference Report* also leads us to conclude that we do not have the authority or the discretion under the statute to create a special lottery preference for women.

Ordering Clause

25. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 4(j) of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 154(j), and section 1.425 of the Commission's Rules, 47 C.F.R. § 1.425, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Re: Third Report and Order in General Docket 81-768

STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON CONCURRING IN PART AND DISSENTING IN PART

I am unconvinced of the wisdom of preference schemes to remedy statistical ownership disparities. I question the practicality, the effectiveness, the fairness and the Constitutionality of any Government actions which are premised on racial or ethnic — or gender based — preferences. However, so long as Congress has determined in this instance that preference schemes are appropriate to remedy broadcast ownership disparities for certain select groups, I believe it is unfair to exclude women.

Congress, in authorizing lotteries for broadcast licenses, required the Commission to award "minority ownership" preferences to specific racial and ethnic groups. This was based on Congress' determination that certain groups, including Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders, have been subject to historic discrimination and underrepresentation in the ownership of broadcast facilities. In addition to this "minority ownership" preference, Congress also required the Commission to award a "media ownership" preference in lotteries if it would increase diversity of ownership.

The majority has concluded that the Commission lacks authority, under the lottery statute, to award either a "minority ownership" or a "media ownership" preference to women. I concur in that determination, based on the rationale set forth in the *Third Report and Order*. I disagree with the majority, however, when it concludes that the Commission lacks "residual authority," under the general public interest provisions of the Communications Act, to create a lottery preference for women.

The history of employment discrimination against women has been widely recognized by Congress, the Courts and this Commission. *E.g.*, S. Rep. No. 92-689, 92nd Cong., 2nd Sess. (1972); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); and *Equal Employment Program*, 32 FCC2d 708, 709 (1971). The underrepresentation of women in the ownership of broadcast facilities has been documented. *Conference Report* at 44-45. The Commission's most recent study indicates that even though women comprise more than half the population, they own only 2.8% of the country's television stations, 8.6% of the AM stations and 9% of the FM stations. *Female Ownership of Broadcast Stations*, The ERLA Group, Inc. (1982).

The Commission traditionally has addressed this issue under the general authority of the Communications Act, without specific enabling legislation. For years, women have received preferences in broadcast comparative proceedings based on the Commission's public interest mandate and our goal of promoting diversity in the ownership of broadcast facilities. *West Michigan Broadcasting v. F.C.C.*, 735 F.2d 601 (1984).

I do not believe Congress intended to prevent the Commission from awarding similar preferences to women in lotteries. The legislative history accompanying the new lottery legislation makes it abundantly clear that Congress sought to have the Commission's traditional diversity objectives "continued" in the comparative process and "incorporated" into any lottery system. *Conference Report* at 38-40. Lottery preferences for women also have been endorsed by both the Honorable Bob Packwood, the then-Chairman of the Senate Commmittee on Commerce, Science and Transportation, and the Honorable Timothy E. Wirth, the Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance.

Attaining the goal of ownership diversity should not depend on the licensing methodology we choose to use in particular cases. The same residual statutory authority that allowed this Commission to grant preferences to women in comparative hearings, in my opinion, could be used now to grant similar preferences to women in lotteries. Accordingly, I dissent from the majority's conclusion that the Commission lacks residual authority under the Communications Act to create a special lottery preference for women.

CONCURRING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Third Report and Order in General Docket No. 81-768 —
Women's Lottery Preferences

My decision not to vote to create a distinct female ownership preference for use in mass media lotteries is one that did not come easily. My initial view was that we lack the authority to create such a preference in light of the legislative history of Section 309(i).[1] The record developed in the *Third Report and Order* has confirmed my initial analysis of the law. I, therefore, feel constrained to concur in the decision not to create a female preference absent further legislation.

The proceeding does, however, raise an important policy issue worthy of further congressional study. Minorities and women often have an identity of interest in matters concerning diversity in the mass media. I am pleased, therefore, that Commission is making good on its promise[2] to forward the record developed in this proceeding to the relevant congressional subcommittees for their further review. It may be that Congress will see fit to amend Section 309(i) to authorize a female ownership preference as it has done for minorities.

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[1] *Third Notice of Proposed Rulemaking*, 95 FCC 2d 432, 443 (1983) (Concurring Statement of Commissioner Henry M. Rivera).

[2] *See* 95 FCC 2d at 440, para. 20.

Application, Dismissal of
Failure to Prosecute
Interlocutory Ruling, Appeal From

Review Board denied appeal from ALJ's ruling dismissing appellant's application. Appellant blamed counsel for its faults and argued that dismissal was contrary to Commission policies favoring minorities. The Board held that applicant could not escape consequences by shifting responsibility to counsel and that its minority composition did not outweigh failure to prosecute.

—*RKO General, Inc.*
MM Docket 84-1098

FCC 85R-103

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
RKO GENERAL, INC. (KFRC) San Francisco, California	MM DOCKET NO. 84-1098 File No. BR-43
For Renewal of License	
GOLD COAST BROADCASTING, INC. San Francisco, California *et al.*	MM DOCKET NOS. 84-1099 to 1102, 1110 and 1111
For Construction Permit for a New AM Station	

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1985; Released: December 23, 1985

BY THE REVIEW BOARD:

1. This is an appeal filed by Horizon Communications, Inc. on November 21, 1985, pursuant to Section 1.301(a) of the Commission's Rules, 47 CFR § 1.301(a), from a ruling by Chief Administrative Law Judge (ALJ) Fitzpatrick dismissing Horizon's application for failure to prosecute in this multi-party comparative hearing. Six other applicants and the Mass Media Bureau have supported the ALJ's ruling, which ruling we will affirm. After conducting our own review of the record, we are satisfied that this case does not present any "special circumstances" justifying Horizon's inaction or otherwise warranting reversal of the dismissal ruling. *See Sco-Kim, Inc.*, 90 FCC 2d 960 (Rev. Bd. 1982); *Cf. Horizon Community Broadcasters, Ltd.*, FCC 85R-100, released December 17, 1985. The Chief ALJ struck a proper balance between the need for speedy and thorough hearings in complex multi-party comparative cases and the rights of individual applicants, while insuring that scarce broadcast facilities are licensed to the best qualified applicants. *See Faith Center, Inc.*, 92 FCC 2d 1255, 1260 (Rev. Bd.) *rev. denied*, FCC 83-530, (Comm. 1983), *affirmed by judgment*, No. 83-2295 (D.C. Cir. May 9, 1985).

2. The ALJ's ruling, issued orally during a hearing session held on November 8, 1985, in response to a motion to dismiss filed by RKO General, Inc., was predicated on a series of continuing derelictions by Horizon. Specifically, prior to hearing, Horizon ignored all of the deadlines established by the ALJ's procedural schedule set out in his Order, FCC 85M-3020, released August 2, 1985: (a) notification by August 9, 1985 whether Horizon intended to submit the direct written testimony of two witnesses as part of its direct case on basic qualifying issues specified against it; (b) submission by August 23, 1985 of direct written testimony of the two witnesses referred to above; and (c) submission by October 7, 1985 of direct written testimony and exhibits on the added issues and a list of witnesses. Thereafter, Horizon (d) failed to appear at the scheduled hearing session on October 29, 1985; (e) failed to go forward with its case on the issues when called on to do so on November 8, 1985 by the ALJ; and (f) failed to respond to RKO General's motion to dismiss the application. *See* Tr. 5003-5008. On November 14, 1985, the ALJ released a Memorandum Opinion and Order memorializing his dismissal ruling. FCC 85M-4452.

3. In its appeal, Horizon places the entire blame for its lack of prosecution on its ex-counsel, asserting that its principals "were awaiting their turn to testify when, to their shock, they learned ... that they had been dismissed." Stressing that all of the participating principals are women, three of whom are Black, Horizon argues that dismissal of its application is unfair and contrary to Commission policies favoring minorities and selecting applicants on their merits. Oppositions were filed by Gold Coast Broadcasting, Inc. and South Jersey Radio, Inc. on November 25 and 27, 1985, respectively; a joint opposition was filed on December 3, 1985, by RKO General, Inc., Paul J. Growald, Gold Mountain Broadcasting Co., and Cozzin Communications Corporation; and comments were filed by the Mass Media Bureau on December 4, 1985, in which the Bureau urged that the appeal be denied.

4. We will deny the appeal. The Board has recently held that an applicant "may not escape the consequences of its non-prosecution by shifting responsibility to its former counsel." *Vela Broadcasting Co.*, FCC 85R-93, released November 15, 1985, para. 7. Otherwise, the Commission would have to reinstate automatically an applicant blaming counsel — no matter how much the applicant's remiss behavior prejudiced competing parties and wasted Commission resources — or have to evaluate "questions of professional competence more properly left to courts and boards of review established for this purpose."*Id*, quoting *United Public Broadcasting Co., Inc.*, 57 RR 2d 1605, 1606 (1985). Here, based on our own review of the record, we are not persuaded that the lack of prosecution of Horizon's application rests solely on its ex-counsel. As pointed out by the Mass Media Bureau, it appears that at least one of Horizon's principals was present at the hearing session held July 31, 1985 where the presiding ALJ discussed the future procedural schedule, the specific dates involved, and Horizon's responsibilities with respect thereto. *See* TR. 3112–3118. Moreover, there is no indication in its appeal that the Horizon officials were unaware of the ALJ's orders, which are customarily mailed to both counsel and applicant. *See Vela Broadcasting Co., supra*; *see also Cuban-American Limited*, FCC 85R-99, released December 17, 1985, n. 4 (Rev. Bd.). Finally, the minority composition of Horizon and Commission policy disfavoring applicant selection by default are not sufficient factors to outweigh the inexcusable lack of prosecution exhibited in this proceeding. *See United Public Broadcasting Co., Inc., supra*; *Hillebrand Broadcasting, Inc.*, FCC 85R-69, released August 16,

1985. ("[T]his agency need not and should not indulge an applicant that repeatedly expends little or no effort to submit basic information in an orderly and timely fashion, especially where as here there are numerous other applicants eager to provide expeditiously a broadcast service to the [San Francisco] area." *Id.* at para. 6. *See also Vela Broadcasting Co.*, *supra*, n. 2.

5. While the difficulties encountered by Horizon may be attributed in part to its choice of counsel, an applicant, particularly one participating in a multi-party comparative proceeding for a broadcast facility, must ultimately be responsible for its conduct and its affairs handled by its representatives; otherwise, the Commission's mandate in choosing a qualified applicant while also providing expeditious broadcast service to the public would be administratively unworkable. The Board is mindful of the Court's holding in *Butler v. Pearson*, 636 F2d 526 (D.C. Cir. 1980), where an award of reasonable attorney's fees for counsel's negligence was considered an appropriate sanction over dismissal of a complaint in a personal injury case. Here, however, the public interest in expeditious and fair comparative hearings would not be served by affording Horizon an opportunity to commence this proceeding anew where there are at least six other applicants who have complied with the established requirements. *See Cuban-American Limited*, *supra*, at para. 5. "We must also be sensitive to the administrative imperatives of multi-party proceedings, such as the instant case, and to the wages of a cavalier attitude toward the hearing process."

6. ACCORDINGLY, IT IS ORDERED, That the Appeal From Memorandum Opinion And Order Of Chief Administrative Law Judge Thomas B. Fitzpatrick, filed November 21, 1985, by Horizon Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Common Carrier, Data Processing Service
Common Carrier, Interconnection, Customer-Provided Equipment
State and Local Control

Notice of Inquiry adopted initiating an inquiry into policies governing the provision of shared telecommunications services (STS) including the impact of STS on local telephone companies, its effect on telephone subscribers, both directly and through its impact on local exchange rates, and the effects of state regulation on STS implementation.
— *Shared Telecommunications Services*
CC Docket 86-9

FCC 86-26

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Policies Governing the Provision of Shared Telecommunications Services	CC Docket No. 86-9

NOTICE OF INQUIRY

Adopted: January 14, 1986; Released: January 27, 1986

BY THE COMMISSION:

I. *Introduction*

1. In a companion Order adopted today,[1] we have addressed a Request for Declaratory Ruling filed by the International Business Machines Corporation (IBM) asking us to declare that state laws and regulations precluding the competitive provision of shared telecommunications services (STS or "shared tenant services") are inconsistent with, and have been preempted by, our

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[1] In the Matter of International Business Machines Corporation, Request for Declaratory Ruling re State Regulation of Shared Telecommunications Services Systems, File No. ENF 85-45, *Memorandum Opinion and Order,* adopted Jan. 14, 1986.

existing decisions and policies.[2] In the *STS Interconnection Order,* we have affirmed the right of users, including STS operators, to interconnect the CPE used to provide STS with the public switched network; however, we have also held that our existing interconnection policies have not preempted state restrictions on the resale of local exchange service by STS systems. In this *Notice,* we are initiating an inquiry to examine the issues raised by the introduction of STS systems and the resale of local service, including the impact of STS on local telephone companies, its effect on telephone subscribers, both directly and through its impact on local exchange rates, and the effects of state regulation on STS implementation. Based on our examination of these issues, in light of the record to be compiled in this proceeding, we will determine whether any further federal action in this field is appropriate.

II. Background

A. Description of STS

2. STS systems employ widely available communications and computer technologies to provide their users with interexchange and local telecommunications services and, in some cases, a variety of enhanced services. In an STS system, the occupants of a multitenant building, a building complex, or a real estate development tract use voice and data equipment located on their premises to connect with a shared PBX or other electronic switching device (STS switch) provided by the building owner, a user association, or an outside contractor. The STS switch allows STS users to call each other directly without using local exchange carrier (LEC) facilities and to call anywhere on the switched network through trunk lines connecting the STS switch with the LEC central office (CO). In addition, the least cost routing features of most switches used in STS systems allow the STS operator to resell interexchange services purchased from a variety of carriers.

3. STS systems can be configured to provide local service to their users in two basic ways. In its most comprehensive form (unpartitioned configuration), an STS system aggregates the local service needs of all system users and connects the STS switch to

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[2] International Business Machines Corporation, Request for Declaratory Ruling re State Regulation of Shared Telecommunications Services Systems, filed May 16, 1985, File No. ENF 85-45 (hereinafter IBM Petition).

the LEC's CO with the minimum number of lines required to meet overall system requirements. In this configuration the entity operating the STS system resells to STS customers local service purchased from the LEC.[3] By aggregating the requirements of all the users, the lines to the CO can carry more traffic over a given period than if requirements were not aggregated. Thus, fewer local loops are required to provide a given level of service. In most cases an STS system would need 10 to 50% fewer access lines (depending on calling patterns and the size of the system) than its customers, in the aggregate, would require if they each were to obtain service directly from the LEC. In addition, all calling among STS tenants would be switched through the STS switch and not the LEC CO. Thus, for this "behind-the-switch" calling, LEC facilities would not be involved at all.

4. An alternative STS configuration employs an STS switch that is partitioned to provide each STS user with individual access to the LEC CO. In a partitioned configuration, the CO lines would still be connected to the partitioned STS switch, but the switch software, and in some cases special hardware, would treat the access lines as if they went directly to each tenant. A partitioned STS switch allows no aggregation of user demand for local service and maintains the number of access lines at approximately the pre-STS system levels, with each building tenant receiving an individual bill from the LEC. Moreover, with most partitioned STS switches, calls between STS users are switched through the LEC CO rather than the STS switch, although intra-tenant, intercom calling is usually available.

B. State Regulatory Response to STS Systems

5. The introduction of STS systems has attracted substantial regulatory attention at the state level. Some state regulatory Commissions have reacted favorably to the introduction of STS systems,[4] while others have developed, or are currently developing, regulations that may make STS services more expensive and less efficient than they would otherwise be. One common concern STS technology has raised among state regulators is the impact

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[3] Local telephone service is purchased from a local exchange company by the real estate owner, manager, or other third party, which then resells that service to the STS customers. Local service can also be shared by users of the STS system pursuant to a formal sharing arrangement.

[4] Tariffs and/or regulations in effect as of May 1985 in Arizona, California (except GTE areas), Connecticut, Illinois, New Jersey, New York, and Texas appear to allow local service resale by an STS operator. *See* IBM Petition, Appendix to Request for Declaratory Ruling (hereinafter "IBM Appendix").

of local service resale on the continued viability of local exchange companies and universal service.[5] Some states explicity prevent local service resale (or impose a partitioning requirement),[6] while others only allow resale if the reseller obtains a certificate of public convenience.[7] This latter requirement is the equivalent of a local resale prohibition since only one certificate is allowed in a particular area, and the telephone company has already received the single certificate. To conform to these state regulations the STS operator is required to partition its PBX, which eliminates the aggregated use of local exchange access lines and imposes on the system the additional costs needed to perform the partitioning functions. Other requirements on the use of STS systems that are either in effect or under consideration for various states include: (1) special rates for access to the local exchange that differ from the rates charged non-STS customers for identical facilities; (2) prohibitions on the completion of "behind-the-switch" calls by STS systems; and (3) geographic and other limitations on the size of STS systems. Many states are still studying the regulatory requirements for STS systems.

III. Issues Raised By the IBM Petition

6. The result we reached in the *STS Interconnection Order* — that the majority of the important questions raised by state restrictions on STS systems are not resolved by our existing decisions — leaves us with a wide range of issues that must be examined before we can reach any final conclusions about what sort of further federal action, if any, is appropriate with respect to state regulation of STS. Unfortunately, in considering those issues, we find that we are handicapped by certain deficiencies in the record compiled in response to the IBM Petition. Many of the commenters quite understandably focused their attention on the principal question raised there — that is, whether our previous decisions on CPE interconnection rights had necessarily preempted state regulations restricting local service resale. However, a determination of whether or not we should preempt in some or all of the areas suggested by IBM and its supporters involves a broader set of policy issues and requires a more complete factual record than we currently have before us. Therefore, we believe

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[5] *See infra* paras. 15-20.

[6] Tariffs and/or regulations in effect as of May 1985 in Kansas, Oklahoma, and South Carolina appear to preclude the resale of local service, although Kansas and South Carolina allow shared use. *See* IBM Appendix.

[7] As of May 1985, such states include Arkansas and North Carolina. *See id.*

that additional comments are required before we make a final decision on how to deal with state regulation of STS systems.

7. In the following sections, we discuss various issues raised in the existing record and pose questions to focus future comments on areas we believe are particularly important in determining our future course of action. In responding to these questions we request commenters to provide specific facts, and illustrative examples, underlying the conclusions they draw. We also invite commenters to propose alternatives to federal preemption of state restrictions on local service resale as a means of addressing what the STS industry perceives as the problems raised by state regulatory restrictions. We also suggest, and seek comment on whether, some areas of STS regulation exist that clearly should be left to state regulators, even if we find that federal action in other areas is warranted. Underlying our inquiries will be our tentative conclusion that — were we to determine that important federal interests are jeopardized by certain state regulations of STS systems and that alternative measures to protect these interests were impracticable — we have sufficient authority to preempt such regulations up to and including restrictions on the resale of local service. We invite comment on this tentative conclusion, and we explicitly do not make any final determination on the extent of our authority until we decide in a subsequent order whether any federal action is required.

A. Potential Benefits From STS Systems

1. Cost Savings From STS

a) Comments

8. IBM and the commenters supporting its Petition argue that STS systems provide three principal types of reduced costs for their users. First, they argue that by spreading the costs of a large PBX or switch among all STS customers, STS systems provide small users with access to communications technology and services that are often only available to the largest users. Among the services STS systems purportedly make available to small users are call forwarding, call waiting, queuing, high-speed data transmission, and enhanced services such as protocol conversions, data and word processing, and message center services. Second, they argue that STS systems can allow groups of small users to aggregate their demand for toll services, making it

economic for them to subscribe to bulk-rate, long-distance services. By using a combination of bulk-rate and regular long-distance services from AT&T and the OCCs, the least-cost routing features of the STS switch can provide individual users with significant reductions in long-distance costs.[8] Third, they contend that STS systems employing unpartitioned switches may provide system users with substantial economies in their access to the local exchange. They assert that the aggregation of STS customers' local service requirements allows lines to the LEC CO to be more efficiently used and reduces the number of lines needed to provide local service, substantially reducing user costs in jurisdictions without measured local service.[9] In addition, they note that calling among STS customers through the STS switch eliminates the need for tenants located in the same (or adjoining) building(s) to route calls to one another through a LEC CO switch located some distance away.

9. STS proponents further argue that in the long run STS systems will save societal resources because they require fewer trunks from the LEC CO to the buildings served by STS switches. They also contend that in many cases these benefits will be realized in the short run, because existing trunks are at or near capacity in some areas, and the widespread introduction of STS technology could postpone for some time the need to introduce additional trunk capacity — a potentially significant saving. These parties also argue that a portion of the reduction in local loop costs that would occur from the widespread implementation of STS systems would accure to users of interstate services. They note that part of the cost of local exchange service is allocated to the interstate jurisdiction by the jurisdictional separations rules, and to the extent that such costs are reduced, interstate users benefit.

10. While most commenting parties agree that STS systems can provide users with access to high technology communications systems and may reduce long-distance costs, a number of parties dispute the contention that substantial benefits accrue to users from the resale of local service. They argue that a substantial part of the cost saving accruing to STS customers from local service resale may be a consequence of state pricing policies that use the rates paid by business customers to subsidize high-cost residential service. Thus, they argue that a majority of the cost saving is the

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[8] IBM estimates that such savings could reach 30%. IBM Petition at 4.

[9] IBM estimates that STS subscribers' local service costs can be reduced 20% or more. IBM Petition at pgs. 3–4.

elimination of state-mandated subsidies based on uneconomic pricing, rather than the creation of economic efficiencies.[10] Parties opposed to the IBM Petition also argue that the overall savings of societal resources and potential benefits to interstate users that would occur from the widespread introduction of STS are not substantial. They contend that most of the costs of laying cable are labor-related (the cable itself is relatively inexpensive), and therefore the marginal cost of additional cable capacity is very small. Thus, they argue, STS does not save substantial societal resources or substantially reduce the local loop costs allocated to the interstate jurisdiction over the long-run so long as any additional cable must be installed.

b) Discussion

11. The introduction of STS systems would seem to provide certain benefits to the public by increasing the availability of state-of-the-art telecommunications technology and by providing opportunities for small users to take greater advantage of competition in interstate service. However, we do not believe that we have received sufficient data and other information to assess the cost savings STS systems will provide to STS customers and society as a whole, especially those that derive from the resale of local service. Therefore, we believe a number of questions exist that should be addressed by further comments.

i) Do STS systems provide equipment and service features not otherwise economically available to small users? Can Centrex provide these features?

ii) Would societal resources be saved by the reductions in trunking requirements that STS could provide? If so, how substantial would these savings be, and over what time period would they be realized?

iii) What are the marginal costs of installing additional trunks from the CO to end users (*i.e.*, are most of the costs in digging up the street or putting up the pole)?

iv) What are the relative economic characteristics of distributed versus centralized switching? Are any additional costs or benefits realized by society from distributing switching capacity throughout the network, as in STS systems, rather than relying principally on CO switches?

v) How much of the savings accruing to STS users from the resale of local service results from the avoidance of state-required, above-cost pricing?

vi) Are the reductions in local service costs from the traffic aggregation

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[10] For a more detailed discussion of this argument *see infra* paras. 15–17.

capabilities of STS switches passed on to STS customers by STS operators?

vii) Do any cost savings to STS customers, LECs, or society exist other than those noted above?

2. *Eliminating Discrimination Against Small Users.*

a) Comments

12. Supporters of the IBM Petition allege that state restrictions on the resale of local service discriminate against customers of STS systems. They indicate that, compared with state regulation of non-shared PBXs, STS systems are being unfairly restricted and are being charged higher rates for local service. They allege that single-entity users of PBXs are permitted to concentrate demand for local exchange service over the minimum number of trunks necessary to satisfy demand, while the multiple users of PBXs in STS systems are prohibited from doing the same thing, even though both groups may have the same telecommunications requirements, occupy identical physical space, and impose identical costs on the network. As a consequence, they argue that STS users of PBXs are required in some states to use more local exchange trunks than non-STS users. Proponents of the IBM Petition contend that regulations of this type unfairly prevent small businesses from taking advantage of the same telecommunications efficiencies the Commission's policies have made available to large businesses. They argue that this creates an artificial economy of scale — one based not on underlying efficiencies, but on regulatory barriers to small firms entering into efficient arrangements.

13. Opponents of the IBM Petition argue that distinctions in treatment based on the legal status of a contracting entity(*e.g.*, single entity versus reseller of service) are historically based and are used in all regulatory decisions. Therefore, they argue that any differences in regulatory treatment between customers of an STS system and single-entity PBX users are based on valid regulatory distinctions that take into account the nature of the user. They further argue that the distinctions drawn in the STS context are rationally related to the achievement of important state goals and should not be overturned by this Commission. They finally argue that such distinctions are frequently drawn in the course of regulation (for instance, residential users versus business users), and without such distinctions regulation would be impossible.

b) Discussion

14. The information we have before us leads us to the tentative conclusion that the existing regulatory treatment of STS systems may well prevent STS customers from using a shared PBX in as efficient a manner as individual telephone subscribers can use unshared PBXs. We are also concerned with the possibility that this result unfairly discriminates against smaller users, which in some cases may obtain access to sophisticated CPE only through an STS system, and may confer an unwarranted competitive benefit on larger firms, which can afford their own PBXs.[11] However, until we obtain more information on the cost savings that STS systems provide to their users,[12] we are unable to determine if this difference in regulatory treatment conveys substantial real advantages to large business users vis-a-vis their smaller competitors. Furthermore, on the present record, we are unable to determine if state regulations that treat multi-user PBXs differently from single-user PBXs can be justified on economic, technical, or other regulatory grounds. We pose the following questions as a means of seeking information on these issues.

i) Do state restrictions on STS systems impose competitive burdens on small firms?

ii) Are there any technical or economic (or other) reasons (not dealing with universal service concerns, which will be discussed separately) for imposing different regulatory treatments on STS systems than on single-user PBXs (*i.e.* does sharing of a PBX by multiple users impose additional costs or burdens on the local exchange that a single-user PBX does not)?

B. Potential Problems Created by the Widespread Introduction of Unpartitioned STS Systems

1. Adverse Impact on Universal Service

a) Comments

15. One of the most significant concerns expressed by state utility regulators and other parties opposed to the IBM Petition

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[11] For many firms telecommunications is a vital service and represents a major cost of doing business. As a matter of Commission policy, restrictions on the use of interstate services — whether imposed by regulation or telephone company tariff — that disable small firms from combining their telecommunications needs and resources in order to realize the efficiencies enjoyed by large firms are generally not favored.

[12] *See supra* paras. 8-9.

is the need to preserve "universal service", *i.e.* the current situation in which the vast majority of American households have telephone service. They assert that universal service historically has been achieved by pricing most residential service at levels substantially below cost and that the revenue shortfall has been recouped from subsidies generated from both toll users, through "toll loading" (*i.e.*, the inclusion of local subscriber line costs in toll rates), and low-cost, local subscribers, through local rate averaging. They contend that the widespread introduction of unpartitioned STS systems has the potential for significantly undermining local rate averaging as a means of supporting universal service, and thus they strongly oppose any federal action limiting states' authority to restrict the resale of local service by an STS system.

16. These opponents of the IBM Petition characterize STS resale of local exchange service as "cream-skimming" of LECs' low-cost users. They note that most state commissions require LECs to charge their customers a fixed cost for each access line based on the type of service required, regardless of the costs a particular access line actually imposes on the network. They note that for customers located near LEC COs, the average price charged for an access line may substantially overstate the costs those customers actually impose on the network. Furthermore, they assert that when a number of access lines connect to a single location, the marginal cost of additional lines (or even their average cost) may be much less than the price actually charged by the LEC. Thus, they contend that each line employed by a low-cost user contains a substantial subsidy that is used to pay for high-cost users' access to the public switched network.

17. Those opposing the IBM Petition argue further that PBXs used by STS systems can, through their ability to aggregate traffic, reduce the line requirements of STS customers (as opposed to customers taking direct service from the LEC) and, consequently, reduce LEC revenue derived from these customers. They state that in most cases the revenue reduction to the LECs is substantially greater than any corresponding reduction these systems provide in LEC costs. Thus, they indicate that the lost revenue will have to be recouped from those users who remain as direct subscribers to the LEC, driving the price they pay closer to cost. They finally argue that, as STS systems become more and more common, at some point all prices will be driven toward costs and *de facto* rate deaveraging will be imposed on the local exchange. Most of the highest cost users, they assert, will be in

low density, residential areas,[13] and in a deaveraged environment these customers could be faced with very substantial increases in the cost of basic service — potentially driving them off the telephone network. They conclude, therefore, that resale of local exchange service by STS operators would be "publicly detrimental" since it could raise local rates and threaten universal service.

18. Parties favoring the IBM Petition argue that local rate deaveraging would not inevitably occur as the result of a Commission decision to preempt state restrictions on the resale of local service. They argue that STS systems can reduce LEC's costs in at least two important respects, and thus might have an overall positive revenue impact on the LECs. First, they suggest that LEC costs would be reduced for new buildings since not as many access lines would have to be installed. Second, they assert that in most situations LECs' administrative costs would be reduced since they would have to deal with only a single STS operator rather than the numerous individual tenants who subscribe to the STS system. In support of their contentions, STS proponents cite information prepared by at least one LEC, Mountain Bell, that suggests that as a result of these savings STS can have a net positive revenue impact on the LECs.[14]

19. Parties supporting the IBM Petition further suggest that prices for all users of PBXs (not just STS users) could be structured in such a way that the current system of averaged rates and subsidies would remain intact.[15] They argue that measured pricing or increased flat-rate charges could be employed by a state commission to offset any revenue loss occasioned by the introduction of a PBX or STS system. They note that one benefit of such an approach is that it would not impose upon STS operators (and their customers) the potentially significant costs of installing a partitioned STS switch. Furthermore, they argue that it would spread the burdens of paying for any local exchange subsidies more equitably over both large business users, who can afford their own PBX, and small users who share a PBX through STS systems.[16]

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[13] These STS opponent assert that the cost of connecting these customers to the LEC CO is usually high because of the distances involved.

[14] Sharetech Comments, Attachment II at 20.

[15] *See*: NATA Reply Comments at 12.

[16] This is one aspect of the STS proponents discrimination arguments, which are described in more detail, *supra* at para. 12.

b) Discussion

20. We believe that the impact of STS on local rate structures and universal service is a very important issue that we should address in determining our future course of action with respect to state regulation of STS systems. However, we also find that it will be useful to have more information on the various factors implicated by this issue than is contained in the existing record. For instance, no party responding to the IBM Petition has provided information on the amount of subsidies that low-cost users actually contribute toward the service of their high-cost counterparts, or the extent to which removal of that subsidy would affect residential rates. Therefore, we request that parties address the following questions, and wherever possible provide specific factual information underlying their conclusions.

i) Would widespread implementation of STS systems inevitably lead to rate deaveraging?

ii) Do business customers actually subsidize residential customers and, if so, what is the impact of these subsidies on residential rates?

iii) What are the relative costs of urban, suburban, and rural local loops? (Some have suggested that savings from the shortness of length and relative density of local loops in central cities are more than made up for in higher right-of-way, installation, and maintenance costs.)

iv) Do reductions in revenue from STS outweigh administrative savings? (Studies like those conducted by Mountain Bell would be useful.)

v) Would local measured service or other non-discriminatory local tariffs solve the universal service problems created by the introduction of STS systems?

2. Adverse Effects on Users From Unregulated STS Systems

a) Comments

21. Some state commissions and LECs also argue that we should not preempt state regulation of STS systems because such systems could then become, in effect, local telephone companies whose customers would not be subject to state regulatory protection. They argue that at least some building managers require their tenants to use the STS system, and tenants in such a building who are not receiving reliable service from the STS operator may find it very expensive to break a lease in order to obtain good quality telephone service. Thus, they claim tenants

could become trapped in lease situations that would enable the STS provider to charge exorbitant rates for inferior service.

22. Parties opposed to the IBM Petition further argue that the growth of STS systems may limit the ability of end users to choose their own interstate service and CPE, since in many cases STS customers must take the services and equipment offered by the STS operator. They contend that this reduces customer choice and raises the spectre that, since some STS operators are affiliated with large CPE and interexchange service vendors, these operators could become end-to-end providers of bundled service in the manner of the predivestiture Bell System.

23. Parties supporting the IBM Petition dispute the contention that tenants in STS buildings will be unable to obtain service from the LEC. They argue that in most cases tenants in STS buildings are free to obtain service from LECs if they are unhappy with the price, quality, or availability of the service provided by the STS operator. They also indicate that many states require STS operators to allow tenants in the buildings in which they operate to obtain service from the LEC. Therefore, any STS operator that fails to provide quality service at fair prices will find itself with a shrinking customer base. Moreover, they claim that STS systems will primarily be employed as inducements offered by landlords to rent office space and are unlikely to become significant rivals to the LECs. They suggest that landlords concerned with maintaining high occupancy rates in their buildings will not allow STS operators to offer substandard service that would reduce the attractiveness of their buildings to present and potential tenants. Thus, they argue that market forces will ensure good service from STS operators without any state regulatory oversight.

24. Finally, with respect to the acquisition of CPE and interexchange services, the STS proponents argue that competition will not be impaired, but will focus on STS providers rather than their customers. Indeed, it is asserted that the ability of small users to enjoy the fruits of competition in CPE and interexchange services will be enhanced since STS systems allows large numbers of such users to pool their purchasing power and take advantage of volume discounts and bulk rates. They also argue that end users still retain ultimate control over their equipment procurement since they do not have to take service from an STS operator in most cases, and in any event, if they do not like the services offered by a particular STS operator, they do not have to move into a building it serves.

b) Discussion

25. Like state regulators, we are concerned that the implementation of STS systems not lead to degraded service and higher prices for telephone service for tenants in STS buildings. In part, for this reason, we have tentatively concluded that this is an area that we will leave to state discretion even if we were to conclude eventually that preemption of some state regulation is warranted.[17] However, we think it would be useful to gather further comment on these issues to aid us in our evaluation of this tentative conclusion.

26. We note initially that in those STS systems in which the user can obtain access to the LEC, the potential for abusive behavior by the STS operator would appear to be substantially diminished. Accordingly, we request comment on the extent to which STS operators, either as a business practice or as the result of state regulation, provide such access to the LEC. Furthermore, even if the STS operator is an exclusive provider of telephone service in a building, the potential for abuse would seem to be limited if competition in the business real estate market provides potential tenants with the ability to chose among many available buildings. Moreover, there appear to be some similarities between STS operators' provision of telephone service, and a landlord's provision of other regulated utility services, such as electricity or gas — at least with respect to the problems noted above. In most buildings the landlord acts as the intermediary between the tenants and the regulated utility company, yet there is generally no perception that it is necessary to place the tenant in direct contact with the utility to maintain service quality and avoid landlord abuse. We ask commenters to focus on the differences between these services and telephone service that might require a different regulatory response. We also ask commenters to address the following, specific questions.

i) Do landlords require tenants in their buildings to subscribe to the STS system as a condition of obtaining office space? How many states prevent landlords (or STS operators) from imposing such requirements?

ii) Have substantial number of complaints been filed against STS operators dealing with the price or quality of service?

iii) Are customers of STS systems able to select their own station equipment vendors and interexchange carriers, or are these choices made by the STS operator?

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[17] *See infra*, para. 43.

iv) Are there any public safety considerations implicated by the introduction of STS systems in a building?

3. *Stranded Investment, Duplication of Facilities, and LEC Planning*

27. Parties opposed to federal preemption argue that the widespread introduction of STS systems will result in substantial stranded LEC investment in subscriber loops running to buildings with STS systems. They contend that the problem will be particularly acute for existing buildings that are retrofit with STS equipment. They indicate that in these buildings the LEC will have loops in place that will no longer be required, and these loops will continue as part of the rate base even though they no longer generate income to the LEC. They contend that existing ratepayers will have to pay for this stranded investment.

28. Moreover, these parties assert that if a state requires the LEC to be prepared to provide backup service if an STS provider fails to provide service or the customer requests LEC service, duplicative equipment, including local loops and inside wire, may be necessary for the LEC to meet these potential service requirements. They further assert that even absent a state requirement, there could be duplication of facilities if the LEC and the STS provider have independently installed equipment that enables them to provide service.

29. Parties opposing the IBM Petition further argue that the development of STS in an area can subject LEC facilities planning to an increased range of uncertainties. They note that LECs plan several years in advance, and without detailed information on STS developments, they may plan to install access lines and develop system capability for a larger subscriber base than is actually required. They also argue that even when a LEC knows that a building will contain an STS system, it may have to provide service to some of the tenants in the building, but it will not know how many until the STS system is in operation. Some LECs argue that these uncertainties make long-range planning very difficult. They point to the size of actual or potential STS systems as exacerbating this problem, asserting that such systems can become, in effect, rival telephone companies in LEC operating areas with the ability to siphon off a significant amount of telephone company business.

30. Parties supporting the IBM Petition argue that stranded investment will not be a significant problem. They contend that retrofitting of existing buildings has not been, and is not likely to become, very common because of the substantial expense involved. They note that most STS buildings will contain a mixture of STS and LEC customers, and as long as the LEC installs the proper number of lines initially, the distribution of customers switching to or from the LEC should keep most lines employed at all times. They also argue that planning for an STS building is no different than planning for any other building which may have one or more large tenants that employ PBXs capable of aggregating demand, as well as a larger number of small tenants. In fact, they argue, an STS system takes some of the planning risk away from the LEC since the STS operator will have to absorb the costs of STS customers that move out of a building. Finally, they argue that state regulation concerned with preventing the growth of STS systems into competitive local exchange providers can use geographic or size limitations to achieve this result, and need not completely prohibit the resale of local service.

b) Discussion

31. We believe more detailed factual information with respect to the effects of STS implementation on LEC investment and planning would be especially valuable in allowing us to reach conclusions on the impact of STS. Much of the information provided in previous comments has been highly conclusory, making it difficult for us to evaluate the competing claims of various parties. Therefore, we ask commenters to address the following questions and to provide the facts underlying their analysis to allow us to evaluate the competing arguments.

i) How many states require LECs to provide backup service for all the tenants in a building, even if many of them are already receiving, or will receive, service from an STS operator?

ii) What provisions have been established by states for sharing inside wiring by STS operators and LECs or otherwise providing LECs with access to such wiring in STS buildings? What provisions have been established by states that would eliminate the need for LECs to duplicate STS facilities?

iii) How far in advance do LECs plan facilities and at what point do they need to know a building is likely to contain an STS system? How would LEC planning differ in an STS environment from the situation that currently exists in view of the fact that many office buildings may have only a single tenant with a single PBX?

iv) What percentage of LEC trunks and other facilities is "stranded" at any given point in time? What change in this figure might occur as the result of STS implementation?

C. Effect of State Regulation on STS

1. Comments

32. STS proponents argue that state resale restrictions directly affect the economics of STS systems by increasing the costs of the systems (*i.e.*, the costs of partitioning the PBX) and reducing the savings realized by customers (*i.e.*, the savings on local service). Furthermore, they argue that with these increased costs and reduced savings, STS is no longer a viable option for certain locations or customers; and thus resale restrictions can, as a practical matter, deny to customers all the benefits of STS, including those resulting from the resale of interstate services that STS operators could provide.

33. Parties opposed to the IBM Petition strongly disagree with the argument that state restrictions on resale of local service jeopardize the benefits that users can realize from STS systems. They argue that state limitations on the resale of local service do not prevent STS operators from connecting their PBXs to the network,[18] but merely reduce some of the cost savings that would accrue from the resale of local service. They note that STS operators can still provide interstate service purchased from the OCCs or AT&T and can resell that service to their customers. They further state that STS operators can purchase CPE from a variety of manufacturers and provide this equipment to their customers with all of the features that would be available in an unpartitioned system. Thus, these parties claim that limiting the ability of STS operators to resell local service does not reduce substantially the benefits from STS systems or have an impact on those particular areas, such as the promotion of competition in interstate services and CPE, that have been the focus of Commission concerns. They further argue that the costs of partitioning a PBX are not as great as those cited by the STS proponents and suggest that in many cases only relatively inexpensive software changes are required.[19]

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[18] In the *STS Interconnection Order*, we have held that any attempt by a state to abrogate this interconnection right would conflict with Commission policies and, hence, be unlawful. *See STS Interconnection Order* at paras. 14-15.

[19] Southwestern Bell Comments at 17.

b) Discussion

34. The comments in this area raise the issue of the economic feasibility of STS offerings in the absence of local service resale. We find that our consideration of this important issue would be aided by more specific information on the economics of STS systems and the effects of partitioning, and we pose the following questions to better frame the opposing points of view.

> i) Do resale restrictions on intrastate services actually render STS systems uneconomic, and if so, which is more important for the economic viability of STS systems — the elimination of revenues from the resale of local service or the costs imposed by a partitioning requirement?
>
> ii) What are the costs of partitioning an STS switch?
>
> iii) Do state restrictions requiring the partitioning of a PBX interfere with STS operators' ability to resell interstate service in an efficient manner?
>
> iv) Can a partitioned PBX offer the same features that can be provided through an unpartitioned PBX?

IV. Options for Federal Action

35. In its petition IBM argues that state laws and regulations restricting STS interconnection should be preempted by this Commission in order to enable STS systems to provide their users with efficient access to the public switched network. While such preemption is one option we may consider once we have received comments on the issues addressed in Section IV, *supra*, we are concerned that wholesale replacement of state regulation with a single federal policy would create additional, significant problems. Therefore, we ask commenters to address whether there are alternatives to the federal preemption of state resale restrictions that might serve to allow STS systems to develop, so that users can realize the benefits identified by STS proponents in this proceeding, without intruding unduly into areas of significant state interest.

36. We also believe that a single federal policy dealing with all STS problems could be inappropriate. The problems with STS systems may vary from state to state, and differing state responses would be called for. Moreover, many states allow STS, including resale, and others are in the midst of formulating solutions to the problems STS raises. The states can act in many instances as laboratories to test the various means of regulating STS, and in the long run this process may lead to the formulation

of the most efficient STS policies. Therefore, if some sort of federal preemption should ever be required (a question we have not yet answered), we tentatively conclude that such preemption should be very strictly limited to create a minimal disruption of state regulatory policy. Consequently, we suggest that, regardless of what action we might eventually decide to take, certain key areas of STS regulation should be left explicitly to the states, and in the following section we examine several such areas. We seek comment on these and other types of state regulations that will provide protection for LECs and users without prohibiting STS. Furthermore, in order to aid this evaluation of different regulatory approaches to STS, we also ask parties to provide us with updated information on the status of STS regulation in the various states and their experience in operating under those various regulatory frameworks.[20]

1. Customer Access to LEC Service

37. In order for customers located in STS buildings to obtain service from a LEC, the LEC must be able to use the wiring inside the building (inside wire) to reach that customer. The inside wiring in such buildings may be entirely owned by the STS provider, by the building developer, or by the LEC. Some commenters have indicated that some STS providers do not allow LECs access to the inside wiring, thereby denying customers access to LEC service. Other commenters have indicated that STS opertors may not want to be the provider of last resort and would prefer that the LEC be available to provide service for those customers that request it. Still other commenters have indicated that if the STS provider and the LEC are both required to wire the building, there may be unused resources or "stranded investment."

38. States have enacted a variety of laws to deal with this issue. In Montana, for example, the STS operator must: (1) make inside wire available to the LEC at no cost; and (2) prepare to provide service for an entire building if any part of the building is to be served. On the other hand, in Colorado the STS operator merely has to allow the LEC to obtain access to all tenants in the

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[20] Several of the areas we suggest might best be left to state regulators are discussed in Section III, *supra*. Although the focus there was to aid in developing a further understanding of the issues implicated by the development of STS systems, we believe that these comments will also be relevant in examining various state approaches to regulation of STS.

STS building, while in Iowa proposed rules would require the LEC to pay a reasonable fee for the use of the STS operator's property. We inquire as to whether states should be free to establish regulations on inside wiring in buildings with STS sytems to enable customers in those buildings to obtain access to LEC service. We also ask parties filing comments to address whether some accommodation is possible to allow the costs of inside wiring for joint use buildings to be shared between the STS operator and the LEC.

2. *Size Limitations*

a. *Number of Trunks*

39. Some LECs have suggested limitations on the number of trunks an STS system can use as a means of reducing the impact of STS systems on LEC revenues and planning. Southern Bell, in a tariff filed with the North Carolina Commission, proposed to limit STS system to no more than 500 trunks.[21] We inquire as to whether to leave to the states the ability to impose such a limitation. We also seek comment on whether such limitations could jeopardize the viability of STS systems.

b. *Geographic Boundaries*

40. Parties argue that an STS system can become an alternative local exchange company if it is allowed to connect a group of buildings geographically dispersed throughout a community. They note that STS developments can range in size from one to a large number of buildings or building complexes. Thus, it is alleged that the impact of STS development on the LEC would be very substantial. To reduce the problems associated with the unlimited growth of STS systems some states have placed geographic limitations on STS. For example, the New Mexico State Corporation Commission has approved a tariff that prohibits STS intrasystem wiring from crossing public rights of way except through the facilities of Mountain Bell. Because of the disparities in the local impact of STS developments, we have tentatively concluded that states should decide the appropriate geographic boundaries of STS systems if any are deemed necessary by the state commission.

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[21] The tariff was subsequently turned down by North Carolina because it found that it could only authorize one service provider.

3. Alternative Pricing Policies

41. Several states have established tariffs that employ measured service pricing for entities involved in the resale of local service. Such tariffs, when applied to STS systems, could allow LECs to recover the same revenues from the STS operator that would have been recovered from STS customers in the absence of the STS system. Some parties argue that this would allow the LECs and state regulators to meet their universal service goals. Other parties, while supporting the concept of measured local service in the abstract, argue that the LECs should only be free to recover the increased costs that STS systems impose on local exchange operations and not the subsidies that may be built into business rates. Still other parties argue that regulations that force STS providers to procure local exchange trunks on a measured basis or on a flat-rate basis, but at a "premium" rate, while individual users with PBXs can obtain regular, flat-rate service, are unfair and discriminatory. They contend that in these situations STS operators, and through them their customers, are treated differently from other users with PBXs for reasons that have nothing to do with differences in the costs the two types of users impose on the local network.[22]

42. We tentatively conclude that the states should be permitted to establish rates designed to recover the costs that STS systems impose on the network. We also believe that states must be permitted to pursue other goals, such as universal service, through the rates that they assess intrastate users. We are concerned, however, about the discrimination arguments raised in the present record, and we ask for comments on whether states should be subject to restrictions that would prevent them from charging STS operators different rates from those established for similiarly situated single-user PBX systems.

4. User Rights

43. State regulators have expressed concern that customers of STS systems may not receive the same level of regulatory protection as those subscribers taking service from a LEC and, therefore, their quality of service would be reduced. Service problems that allegedly arise for users include:

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[22] SBS Real Estate Corporation comments at 8.

— higher probability of blockage

— data system security

— billing problems

— inability to obtain repairs when required

— poor transmission quality

— complete disruption of service

— inability to select long-distance carrier

— unregulated rates for intrastate service

Some states have enacted regulations to address these issues. Others have decided to wait until some experience is gained from actual STS developments. We would tentatively conclude that so long as state regulation of these areas does not unduly impair that ability of STS providers to operate, the states would continue to regulate these areas. We invite comment on this conclusion.

IV. Ordering Clauses

44. Accordingly, IT IS ORDERED, pursuant to authority in Sections 4(i), 4(j), 201, 202, 403, and 404 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 403, and 404, That the aforementioned inquiry IS HEREBY INSTITUTED.

45. IT IS FURTHER ORDERED, That comments will be due on March 21, 1986, and reply comments will be due on April 21, 1986.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Diversification of Control of Mass Media
Ownership and Management, Integration of
Past Performance
Programming Proposal
Renewal, Applicant v. New Applicant

Commission renews FM license, denies mutually exclusive applicant for construction permit, reversing previous result after remand from Court of Appeals. Incumbent receives no renewal expectancy for minimal past performance. Incumbent's integration and diversification advantages outweigh challenger's proposed programming and comparative coverage advantages.
— *Simon Geller*

Docket 21104

FCC 85-640

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

SIMON GELLER
Gloucester, Massachusetts

DOCKET NO.
21104
File No.
BRH-1610

For Renewal of License of WVCA-FM

GRANDBANKE CORPORATION
Gloucester, Massachusetts

DOCKET NO.
21105
File No.
BPH-9391

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1985; Released: December 17, 1985

BY THE COMMISSION:

BACKGROUND

1. This proceeding involves the application of Simon Geller for renewal of his license to operate Station WVCA-FM (WVCA), Gloucester, Massachusetts, and the mutually exclusive application of Grandbanke Corporation (Grandbanke) for a construction permit. On June 15, 1982, the Commission issued a Decision denying Geller's application and granting Grandbanke's.[1] The Commission held that Geller's past performance as a broadcaster had been minimal and, thus, undeserving of a renewal expectancy.[2] The Commission further held that this inadequate past record diminished the comparative credit that Geller would otherwise be due for his advantages with respect to diversification of media ownership and integration of ownership into management. In the Commission's view, Grandbanke was entitled to decisive preferences for its superior proposed programming and more efficient use of frequency. However, on June 15, 1984, the United States Court of Appeals for the District of Columbia Circuit remanded this proceeding to the Commission for further consideration.[3] The Court held that the Commission had failed to explain adequately the justification for diminishing Geller's advantages for diversification and integration and thereby had given unjustified weight to Geller's past record. Additionally, the Court questioned whether the record in this proceeding should be reopened for further evidence.

2. The parties were requested to submit comments as to what action would be appropriate on remand.[4] Upon examination of

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[1] *Simon Geller*, 90 FCC 2d 250, *recon. denied*, 91 FCC 2d 1253 (1982).

[2] The comparative evaluation of broadcast applicants is governed generally by the factors set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Factors specifically applicable to the comparative renewal situation, including the renewal expectancy, are discussed in *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1774 (1983). *See also Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *aff'd sub nom. Victor Broadcasting, Inc.* v. *FCC*, 722 F.2d 756 (D.C. Cir. 1983).

[3] *Committee for Community Access* v. *FCC*, 737 F.2d 74 (D.C. Cir. 1984). The Court issued its mandate on August 27, 1984.

[4] FCC 84I-90, released September 4, 1984. Grandbanke and Geller filed comments on October 4 and 5, respectively. Two listeners' groups, the Save Our Station Committee and the Committee for Community Access, filed

their Comments and the record, we conclude that our previous action should be reversed, the Geller's license renewal application should be granted, and that Grandbanke's application for a construction permit should be denied. We will explain our disposition in greater detail below. We will also dispose of certain interlocutory matters.[5]

COMPROMISE PROPOSAL

3. Geller suggests that this proceeding could be terminated by a compromise which would allow both his and Grandbanke's applications to be granted. Geller proposes that a recent Commission policy change[6] permits him to seek modification of this license to specify a new frequency, 96.3 MHz (Ch. 242) in lieu of his present frequency, 104.9 MHz (Ch. 285). According to Geller, Grandbanke's application for Ch. 285 would then be granted. Geller concedes that assignment of Ch. 242 to Gloucester would violate the Commission's FM spacing requirements.[7]

4. The policy referred to by Geller permits licensing on a new frequency without hearing where: (1) the licensee initiates a rulemaking to assign the frequency to upgrade its operation, and (2) an equivalent frequency is available to accommodate others who express interest during the rulemaking.[8] Neither Geller nor Grandbanke has initiated a rulemaking in this regard, and thus, we are in no position in this adjudicatory proceeding to explore the public interest ramifications of assigning Ch. 242 to Gloucester.[9] In the absence of an adequate showing we will not address this matter further.

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comments on October 5 and 9, respectively, generally supporting Geller's position.

[5] Geller suggests that this proceeding has become moot because the Commission's Mass Media Bureau, by an administrative error, routinely renewed Geller's license on March 23, 1984. The Bureau upon discovering the error cancelled its action. Letter from Larry Eads, Chief, Audio Services Division, Mass Media Bureau to Simon Geller (August 14, 1984). It is well established, however, that such a grant, even if not withdrawn as erroneous, is conditioned on the resolution of pending judicial proceedings involving earlier renewals and thus these circumstances provide no basis for considering this proceeding moot. *See Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732 (D.C. Cir. 1976).

[6] *Modification of FM and Television Station Licenses*, 56 RR 2d 1253 (1984).

[7] Section 73.207 of the Commission's Rules.

[8] In the absence of these circumstances, permitting a change of frequency without notice and hearing might violate the rights of other prospective applicants for the new frequency. *See* note 6 *supra*.

[9] Ordinarily the Commission does not permit alterations of its FM Table of Assignments in adjudicatory proceedings. *See Sotomayor* v. *FCC*, 721 F.2d 1408 (D.C. Cir. 1983).

REOPENING OF THE RECORD

5. Following the issuance of the Commission's Decision in this proceeding, Geller filed a Petition for Reconsideration urging that the Commission consider a number of post-designation changes in the facts and circumstances of the case. Geller asked the Commission to take into account: (1) that he had increased WVCA's hours of operation beyond the proposal made in his application; (2) that as a result of aid by a listener's group he would be able to increase the amount of nonentertainment programming broadcast by WVCA; and (3) that as a result of transmitter and antenna site moves WVCA's coverage area would be increased. The Commission denied that Petition for Reconsideration on the grounds that it constituted a belated attempt to upgrade Geller's comparative position.[10]

6. The Court of Appeals affirmed the Commission's denial of the Petition for Reconsideration, noting that the Commission's holding reflects its rule that post-designation amendments that enhance an applicant's comparative position are inadmissible.[11] The Court noted, however, that in some cases — *e.g.*, *Kenneth J. Crosthwait*[12] and *Charles W. Jobbins*,[13] the Commission permitted reopening of the record after remand to update outmoded information. Hence, the Court left to the Commission the question of whether this case presents circumstances that warrant the reopening of the record following remand.

7. In the event the Commission is unable to grant his renewal application on the basis of the present record, Geller submits that he should be permitted to amend his application to reflect the changed circumstances previously rejected by the Commission. Geller contends that his previous failure to report timely WVCA's longer hours of operation and increased coverage resulted because he lacked counsel and that, since the Commission and Grandbanke had notice of these matters, they cannot be fairly characterized as post hoc efforts to upgrade his comparative position. Grandbanke contends that no justification exists for reopening the record, since only the standard comparative issue needs to be considered and neither *Crosthwait* nor *Jobbins* condones comparative upgrading.

8. We will not reopen the record for the purposes sought to be achieved by Geller. We adhere to our previous determination,

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[10] 91 FCC 2d 1253 (1982).

[11] 737 F.2d at 83–84.

[12] 79 FCC 2d 191 (1980).

[13] 68 FCC 2d 46 (1978).

affirmed by the court, that consideration of the post-designation changes in Geller's proposal would allow that applicant to gain an unwarranted advantage in this case. *Charles W. Jobbins*, cited by the court, expressly prohibited the applicants from seeking to upgrade their comparative proposals on remand, while *Kenneth J. Crosthwait* did not involve the question on comparative upgrading. No other matters of decisional significance have arisen which require reopening of the record.[14]

GELLER'S BROADCAST RECORD – RENEWAL EXPECTANCY

9. During the 1972–75 license term at issue here, WVCA presented less than 1% nonentertainment programming and no programming in response to ascertained community needs. Virtually all of WVCA's programming was devoted to symphonic music. WVCA broadcast no news, no editorials, and no locally produced public affairs programs. The station did, however, broadcast 18 public service announcements a week.[15]

10. In view of his failure to present substantial nonentertainment programming responsive to the needs and interests of the community, the Commission concluded that Geller's past performance was minimal and, hence, undeserving of a renewal expectancy.[16] The Commission noted that WVCA is the only broadcast facility licensed to Gloucester and that Geller's financial shortcomings did not mitigate the inadequacy of WVCA's programming. Additionally, the Commission discounted the fact that several community witnesses testified favorably about the entertainment aspects of the station's programming. Under Commission precedent, a renewal applicant with a substantial past record, receives a renewal expectancy in the form of a preference taken into account along with all other preferences in the overall comparative analysis.[17] Because Geller's performance was less than substantial, he received no such preference.

11. The Court of Appeals affirmed the Commission's denial of a renewal expectancy to Geller.[18] Accordingly, that finding will not be revisited on remand, and Geller will receive no renewal expectancy in the overall comparative analysis.

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[14] Geller alleges that the record should be reopened to receive new evidence adverse to Grandbanke. However, in view of our action herein granting Geller's application, these matters are moot.

[15] 90 FCC 2d at 261–65.

[16] *Id.* at 265–67, 270–71.

[17] Cases cited *supra* note 2.

[18] 737 F.2d at 77–78.

PROPOSED PROGRAMMING

12. Geller proposes to continue his present format, broadcasting 99.52% symphonic music, no news, 0.24% public affairs, and 0.24% other nonentertainment programming. Grandbanke proposes to devote 16.9% of its broadcast time to news, 5.9% to public affairs, and 5.9% to other nonentertainment programming, with 55% of its news to be local and regional. Unlike Geller, Grandbanke proposes that its informational programming will be directly related to ascertained community needs and interests. Where Geller proposed a 44 hour 27 minute a week program schedule, Grandbanke proposes to broadcast 136 hours of programming a week.[19]

13. The Commission concluded that Grandbanke deserved a substantial preference for proposed programming for its demonstrated superior devotion to public service.[20] This preference arose from Grandbanke's superior attention to presenting informational programming responsive to ascertained community needs and interests and was enhanced by the significant discrepancy between the applicants' proposed hours of operation and the relative restrictiveness of Geller's programming.

14. As it did with respect to the renewal expectancy, the court affirmed the award of a substantial preference to Grandbanke for its proposed programming.[21] Thus, this finding will not be revisited on remand.

EFFICIENT USE OF FREQUENCY

15. Because of differences between their engineering proposals, Grandbanke's facilities will have greater coverage than Geller's. Grandbanke's 1 mV/m contour will cover more than 300 square miles, providing a signal to nearly 360,000 people, as opposed to Geller's 73 square miles and 43,000 people. All relevant areas are served by at least five other aural signals.[22]

16. The Commission awarded Grandbanke a slight preference based on the superiority of its coverage.[23] Only a slight preference

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[19] 90 FCC 2d at 268, 276. As previously indicated, recent changes in Geller's programming will not be considered because to do so would result in an unfair upgrading of Geller's comparative position.

[20] *Id.* at 273-76.

[21] 737 F.2d at 82-83.

[22] 90 FCC 2d at 268-69.

[23] *Id.* at 276. As previously indicated, recent changes in WVCA's coverage will not be considered because to do so would result in an unfair upgrading of Geller's comparative position.

was warranted since the areas in question are already well served by at least five other aural signals.

17. The court did not specifically address this issue. Grandbanke will therefore continue to receive a slight preference.

INTEGRATION OF OWNERSHIP INTO MANAGEMENT

18. Geller is WVCA-FM's sole owner and employee and will devote full time to the operation of the station. He has been a resident of Gloucester for 13 years. Grandbanke proposes that its 66% owner Edward Mattar will serve as the station's general manager. Mattar has had 3 years of broadcast experience and proposes to move to Gloucester in the event Grandbanke's application is granted.[24]

19. The Commission previously held that despite Geller's technical advantages under the integration criterion, Geller merited only a slight preference over Grandbanke.[25] The Commission reasoned that the rationale of the integration criterion was that an integrated owner would tend to be more sensitive to an area's changing needs and that Geller's poor past broadcast record detracted from these assurances.

20. The court criticized the Commission's conclusions in this regard.[26] In the court's view, the Commission had failed to reconcile its integration analysis in this case with past precedent. The court noted that the Commission did not make, as it usually does, an explicit analysis of the quantitative and qualitative aspects of integration. Moreover, the court noted that the Commission does not customarily reduce the merit accorded for a quantitative integration advantage unless the applicant has committed misconduct. The court speculated that the Commission may have engaged in the type of "functional analysis" of the essentially structural characteristic of integration, which was previously disapproved by the court. Considering the Commission discussion too cursory and vague, the court remanded the matter for further analysis.

21. In his Comments, Geller maintains that his integration advantage is entitled to special weight because of his commitment to Gloucester and his long and unique relationship with that community. Geller claims that he has long served as the "voice of Cape Ann" despite receiving only a meager income. Grandbanke

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[24] *Id.* at 267-68.
[25] *Id.* at 273.
[26] 737 F.2d at 81-82.

argues that reconsideration of the integration factor should not yield a different result. According to Grandbanke, the Commission normally accords no more than a moderate preference for a quantitative disparity in proposed integration such as that found here. Grandbanke contends that Geller's past deficiencies as a licensee fail to enhance his proposed integration and in fact detract from it.

22. Having reexamined the integration aspect of this case pursuant to the court's remand, we conclude that our prior treatment of this issue constituted the type of functional analysis previously criticized by the court.[27] We will therefore reevaluate the integration criterion using our ordinary analytical approach. This approach encompasses a weighing of the customary quantitative and qualitative factors, without attempting to factor in other considerations, such as renewal expectancy and Geller's past broadcast record.

23. Turning first to the quantitative aspect of integration, we agree with Grandbanke that, consistent with precedent, an applicant proposing 100% integration deserves a moderate preference over an applicant proposing 66% integration.[28] Qualitatively, Geller's integration is enhanced by his long term local residence, which outweighs Grandbanke's proposal that Mattar will move to Gloucester prospectively and Mattar's limited broadcast experience. Geller will therefore receive a qualitatively enhanced moderate integration preference to be taken into account in the overall comparative analysis.

DIVERSIFICATION OF MEDIA OWNERSHIP

24. Geller owns no media interests other than WVCA. On the other hand, Grandbanke's principals have interests in other broadcast stations. Edward Mattar, Grandbanke's 66% owner has a 100% interest in station WINQ-FM, Winchendon, Massachusetts. Stockholders with a 34% interest in Grandbanke have a 100% interest in Station WNCS-FM, Montepelier, Vermont.[29]

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[27] *Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37, 56 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

[28] *See WHW Enterprises, Inc..*, 89 FCC 2d 799 (Rev. Bd. 1982), *appeal docketed*, No. 83-2067 (D.C. Cir. October 11, 1983).

[29] 90 FCC 2d at 267. *See also* Comments of Grandbanke Corporation at 3-4. Recently, George B. Spaulding, an 11 1/3% stockholder of Grandbanke, acquired a 7.9% interest in WKSS-FM, Hartford-Meridan, Connecticut. This interest is too slight in light of the other circumstances of this case to affect significantly the diversification analysis.

25. The Commission awarded Geller a moderate preference for diversification.[30] In the Commission's view, based on the degree of media ownership alone, Geller would have been entitled to a substantial preference. However, the Commission believed that Geller's preference should be diminished because of his failure to present substantial amounts of informational programming. The Commission reasoned that the rationale of diversification was to present the public with diverse and antagonistic points of view. Since Geller had virtually abandoned his role as a information source, the Commission concluded that he did not qualify as a diverse and antagonistic voice or deserve full credit for diversification.

26. The court rejected the Commission's analysis.[31] The court held that the crux of the diversification issue is ownership, based on the probability that diverse ownership will lead to a diversity of views. Moreover, the court held that a direct evaluation of the content of a broadcaster's views would be questionable under the First Amendment. In this vein, the court indicated that there was no basis for inferring that the amount of informational programming presented necessarily represented the broadcaster's value as a diverse voice. On remand, the court required, at minimum, that the Commission adequately explain its apparent departure from established principles.

27. In his Comments Geller urges that his diversification advantage deserves special weight because he owns no other media interests whereas Grandbanke's principals have connections with several regional interests. Grandbanke maintains that Geller deserves no more than a moderate diversification advantage based on considerations of ownership alone. Grandbanke observes that its principals outside media interests are relatively small and not located in the service area of the proposed station.

28. Having reexamined our diversification analysis pursuant to the court's mandate, we conclude that it must be revised. As in the case of integration, we believe that our prior discussion relied on an improper functional analysis. In accordance with the court's ruling, we will not look behind the presumption that underlies the diversification criterion.[32] Our prior conclusion that, based on considerations of media ownership alone, Geller deserves a substantial preference stands unabridged.[33] In line with the court's

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[30] 90 FCC 2d at 271–72.

[31] 737 F.2d at 78–81.

[32] 737 F.2d at 79.

[33] This is consistent with prior Commission precedent. *See Billy D. Pirtle,* 43 FCC

views, no other considerations are relevant in this assessment. Accordingly, Geller will receive a substantial preference for diversification.

OVERALL COMPARATIVE ANALYSIS

29. The Commission ultimately concluded that Geller's license renewal application should be denied and Grandbanke's application for a construction permit should be granted.[34] The Commission found that Grandbanke's substantial preference for proposed programming and slight preference for efficient use of frequency outweighed Geller's slight integration advantage and moderate diversification advantage. Because the court disagreed with the manner in which the Commission considered the integration and diversification criteria, it did not reach the overall comparison between Geller and Grandbanke.

30. In his Comments, Geller maintains that once his integration and diversification preferences are given their proper weights, undiminished by "multiple counting" of his past broadcast record, these advantages are decisive. Grandbanke, which considers Geller's integration and diversification advantages to be moderate, submits on the other hand that its advantages for proposed programming and efficient use of frequency are dispositive. Grandbanke continues to assert that Geller's failure to provide substantial amounts of informational programming responsive to local needs and interests should weigh heavily in the comparative balancing.

31. The framework for the comparative evaluation of broadcast applicants is provided by the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings.*[35] There, the Commission enunciated two primary objectives: (1) best practicable service to the public, and (2) diversification of control of the media of mass communications. The former objective encompasses several factors of which those relevant here are: (1) integration of ownership into management, (2) proposed programming, and (3) efficient use of frequency. Under the best practicable service to the public criterion, we have concluded that Grandbanke deserves a substantial preference for proposed programming and a slight preference for efficient use of frequency, while Geller deserves an enhanced moderate preference for integration. On balance, we

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2d 670 (Rev. Bd. 1973). *See also Town and Country Radio, Inc.,* 65 FCC 2d 694, *recon. denied,* 41 RR 2d 1177 (Rev. Bd. 1977).

[34] 90 FCC 2d at 276-77.

[35] *Supra* note 2.

believe Grandbanke should receive a moderate preference for best practicable service. As to diversification, the other primary criterion, Geller receives a substantial preference. Thus, we are faced with a situation in which each applicant is superior to the other with respect to one of the primary objectives of the comparative process. However, the substantial preference awarded to Geller for diversification clearly outweighs the mooderate preference awarded to Grandbanke for best practicable service. For this reason, we believe that Geller is ultimately the preferred applicant.

32. ACCORDINGLY, IT IS ORDERED, That the Decision of the Commission FCC 82-243, released June 15, 1982 IS MODIFIED and the Application of Simon Geller for renewal of license of Station WVCA-FM (File No. BRH-1610) IS GRANTED and the application of Grandbanke Corporation for a construction permit (File No. BPH-9391) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Forfeiture

Maritime Service, Shipboard Violations

Commission denied request for reconsideration of its *Memorandum Opinion and Order* upholding monetary forfeitures against vessel's owner and master for violations of listening watch requirement of Section 83.202(c). Vessel subject to listening requirement since it was being navigated in Delaware Bay, a tidewater adjacent or contiguous to the open sea.

— *Thelma Dale III*

FCC 86-23

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Monetary Forfeitures Against	
HARRY DALE PARSONS 7 Vermont Avenue Lewes, Delaware 19958	PR-2961-S 3153109-004
Owner of the Vessel THELMA DALE III (Ship radio station WK-3617)	
And	
KASMIR RICHARD YAKIMOWICZ 110 West Canal Lewes, Delaware 19958	3153109-003
Master of the Vessel THELMA DALE III (Ship radio station WK-3617	

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1986; Released: January 17, 1986

BY THE COMMISSION:

1. The Commission has before it a request filed September 30, 1985, by Harry Dale Parsons for reconsideration of its Memorandum Opinion and Order released on September 17, 1985. That order upheld the imposition of a $250 forfeiture against Parsons as owner of the vessel THELMA DALE III and a $50 forfeiture against Kasmir Richard Yakimowicz as master of the THELMA DALE III. Both forfeitures were based on violation of Section 83.202(c) of the Commission's Rules, which requires the maintenance of a listening watch on the frequency 156.8 MHz whenever the radio installation is not being used for authorized traffic.

2. In his request for reconsideration, Parsons contends that the observations on which this proceeding is based were made when the THELMA DALE III was in the Lewes Rehoboth Canal, a body of water which is not adjacent or contiguous to the open sea. Since the listening watch requirements of Section 83.202(c) apply only to vessels navigated in the open sea or in a tidewater adjacent or contiguous to the open sea, Parsons argues that the THELMA DALE III was not required to observe a listening watch.

3. Dwight Weller, an engineer employed at the Commission's Baltimore office, made the observations on which this proceeding is based on July 28, 1983, shortly before 4:00 p.m. He repeatedly called the THELMA DALE III on 156.8 MHz without response. During those calls he saw the THELMA DALE III being navigated in the Delaware Bay, which is a tidewater adjacent or contiguous to the open sea.

4. Therefore, Parson's belief that the calls to the vessel were made while the vessel was in the canal is erroneous. Indeed in the Notices of Apparent Liability which began this proceeding, Parsons and Yakimowicz were informed that they were charged with failing to maintain the required watch while the vessel was being navigated in the open sea or adjacent tidewater. There was no reference to the canal.

5. Since the THELMA DALE III was in a tidewater adjacent or contiguous to the open sea, the vessel was required to observe the listening watch requirements of Section 83.202(c). It is

undisputed that it was not maintaining a watch; therefore the rule was violated.

6. Accordingly, IT IS ORDERED That Parson's request for reconsideration IS DENIED. IT IS FURTHER ORDERED That Parsons and Yakimowicz pay their monetary forfeitures of $250 and $50, respectively, within 30 days from the release of this Memorandum Opinion and Order. Payment should be made by money order or check drawn payable to the order of the Federal Communications Commission.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Antenna, Farm

Denied request for short-spacing waiver under Section 73.209(c) "antenna farm" exception where no showing of unavailability of fully-spaced site.
—*Universal B/cing of Indiana, Inc.*

Programming, Minority Oriented

Public interest benefits of minority programming do not outweigh the strong public interest benefit in maintaining the integrity of the FM allocation scheme.
—*Universal B/cing of Indiana, Inc.*

Shortspacing

To meet threshold test for waiver of minimum spacing requirements, applicant must show existing site unsuitable and that non-short-spaced sites are not available.
—*Universal B/cing of Indiana, Inc.*

FCC 86-34

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of	
Universal Broadcasting of Indiana, Inc. WATI-FM, Danville Indiana	File No. ARN-830225AJ
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 1986; Released: January 21, 1986

BY THE COMMISSION:

1. The Commission has before it: (i) the subject application of Universal Broadcasting of Indiana, Inc. ("Universal") for modification of its commercial facility WATI-FM [formerly, WGRT-FM], Danville, Indiana; (ii) a July 20, 1983 letter from the Chief, FM

Branch, returning the application as unacceptable for filing;[1] and (iii) an application for review of that action.

2. *Background.* The subject application proposes a site change from Danville, Indiana to Liberty Township, Indiana, a move seven miles to the Southeast. On July 20, 1983, the Chief, FM Branch, returned the application as unacceptable for filing because such a change would result in an eight-mile short spacing to station WRZQ-FM [formerly WTRE-FM], Greensburg, Indiana. Universal had requested an appropriate waiver, and now asserts that, in denying that request, the staff failed to consider controlling precedent and give due weight to public-interest benefits that would be furthered.

3. Universal argues: that waiver is warranted due to the improved WATI-FM coverage that would result; that technical problems inherent in the present site make relocation of the transmitter desirable; that alternate, corrective, and fully spaced sites are unavailable; and that operation from the site proposed would not adversely affect the first adjacent channel station which it would further short-space,[2] even if that station were to increase to maximum facilities.

4. Universal further states that the proposed site: might be used by Liberty Township for its public-safety, two-way radio communications facilities, thus reducing environmental impact and minimizing effect on air navigation; would improve spectrum efficiency by providing new service to 91,000 persons; and would result in more minority-oriented programming directed to the minority population in the general area. On this last point, Universal contends that, in denying the waiver request, "the Bureau all but ignored" its showing that WATI's programming is Black-oriented, and that the requested waiver would permit WATI to provide new service to as many as 45,677 Blacks and improve service to the entire minority population (150,000) of Marion County, Indiana. Citing *Por Favor, Inc.*, 68 FCC 2d 73 (1978), the applicant argues that its programming justifies the requested waiver.

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[1] Universal previously submitted a similar application which was returned on September 1, 1982 (Ref. staff letter 8920–RLN) as unacceptable for filing under 47 C.F.R. § 73.207, in that the proposed transmitter site was short-spaced approximately eight miles to first adjacent channel (Ch. 297B) station WRZQ-FM [formerly WTRE-FM], Greensburg, Indiana.

[2] WATI-FM is currently short-spaced one mile to first adjacent channel WRZQ-FM, Greensburg, Indiana by virtue of a previous waiver of 47 C.F.R. § 73.207. Neither the existing short spacing nor the one proposed by Universal in the subject application are grandfathered under 47 C.F.R. § 73.213.

5. Consideration of a spacing-waiver request requires us initially to evaluate coverage and the risk of objectionable interference which, together, determine overall service. We have previously concluded that improved coverage may warrant an increased risk of interference only when existing coverage of the community of license is patently inadequate. *Greater Media*, 61 FCC 2d 692 (1976). Grant of a waiver in such cases should result in a significant net gain in overall service. When the existing coverage is adequate we believe it best to uphold our rules which have been designed to maintain a proper balance between coverage and interference. *C. Alfred Dick*, 57 FCC 2d 1020 (1976); *Empire Broadcasting Co.*, 62 FCC 2d 963 (1977); *National Enterprises, Inc.*, 62 FCC 2d 973 (1977). Here, the present 3.16-mV/m contour of WATI-FM encompasses Danville, and the applicant has made no suggestion or showing to the contrary. Therefore, the coverage is considered to be adequate. *Greater Media, Inc.*, *supra*. In fact, the entire thrust of Universal's allegations concerning shadowing is not toward coverage of Danville, the community of license, but rather to areas considerably removed, including the city of Indianapolis. Accordingly, the conclusion must be that any gain in the size of WATI's potential audience does not improve overall service and does not outweigh the consequences associated with significant short spacings.

6. The applicant argues that a waiver of the minimum spacing requirements would provide new and improved service to a substantial population, half of which is comprised of minorities. This fact however, is of no major significance when the area to be served is neither unserved nor underserved. *Stoner Broadcasting System*, 49 FCC 2d 1011 (1974), *aff'd* 35RR 2d 332 (1975). Universal acknowledges both in its original application and its application for review that it is not the sole FM station in the area offering minority-oriented programming. Furthermore, there are 13 FM stations and eight AM stations (including Universal's AM station WGRT) licensed to serve Indianapolis alone. The additional area proposed to be served, then, western Indianapolis and suburbs, cannot be categorized as unserved or underserved. While it is true that in *Por Favor, Inc., supra*, and other AM cases, we have waived acceptance rules dealing with the provision of new service when minority ownership and programming was involved, the Commission's longstanding policy has been to refuse to base waivers of rules designed to prevent interference upon non-technical considerations. This policy has been approved by

the courts. *See, e.g., North Texas Media, Inc. v. FCC*, FCC 84-456, para. 8 (released October 5, 1984), *aff'd*, No. 84-1511, slip op. (D.C. Cir December 6, 1985); *ICBC Corp. v. FCC*, 716 F.2d 926 (D.C. Cir. 1983).

7. Universal also attempts to rely upon a 1965 staff grant without a written justification of construction permit BPH-4992 to the then licensee of WHBI, Newark, New Jersey. That grant involved a short-spacing waiver to a station whose programming was minority-oriented. However, that action is not controlling here. The facts of that case were markedly different. The station in question was already significantly and multiply short spaced, which short spacings were "grandfathered" under 47 C.F.R. § 73.213. The grant to WHBI greatly alleviated one preexisting, severe short spacing, improved one moderate one, aggravated two other existing short spacings and created one new spacing deficiency. The aggravation of grandfathered short spacings is permissible under 47 C.F.R. § 73.213, and the sole new short spacing was allowed by waiver of § 73.213(f)(1).[3] Thus, waiver was not granted on the basis of minority programming. Rather, it appears to have been granted primarily to alleviate a severe, multiple, grandfathered short-spacing problem in the Northeastern region shortly after the adoption of our present FM allocations scheme. *See Revision of FM Rules*, 40 FCC 868 (1964).

8. Universal's attempt to show that there would be no actual interference caused to WRZQ-FM cannot be dispositive. Since 1962, the nature and extent of interference protection accorded commercial FM broadcast stations has been determined solely by the mileage-separation, power and antenna-height limitations set forth in our rules without regard to the concept of protected and interfering contours previously employed. *North Texas Media, Inc. v. FCC, supra*, slip op. at p. 10, n. 27; *First Report and Order* in Docket 14185, 40 FCC 662 (1962); *see Carroll-Harrison Broadcasting, Inc.*, 62 FCC 2d 45 (1976).

9. Universal also requests a finding that it qualifies under the "designated antenna farm" exception to our minimum mileage separations set forth in 47 C.F.R. § 73.209(c). 47 C.F.R. § 17.8 provides for the establishment of designated antenna farm areas by rulemaking. To date, there have been no officially designated antenna farm areas. *See* 47 C.F.R. § 17.9. However, the Commission has recognized that *de facto* antenna farm areas have existed

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[3] § 73.213(f)(1) of the Rules concerning moves by grandfathered short spaced stations provides, in pertinent part: No application to move will be accepted which creates short spacing to standard spaced stations and assignments ....

for some time with beneficial effects. In *WTCN Television, Inc.*, 14 FCC 2d 870 (Rev. Bd. 1968), the Review Board sanctioned the grant of a short-spaced proposal by a Minneapolis television station to allow it to relocate its antenna to a *de facto* antenna farm in the Minneapolis–St. Paul area. The Board found that public-service considerations flowing from location in the antenna farm justified waiver of TV spacing rules. The Board's rationale in *WTCN Television, Inc.*, was followed in *Beasley Broadcasting of Philadelphia, Inc.*, 100 FCC 2d 106 (1985). There, we granted an FM short-spacing waiver so that the licensee could locate its antenna in a *de facto* antenna farm. In marked contrast to the situation presented here, Beasley's inadequate coverage of its community of license was a significant factor, and the *de facto* antenna farm comprised twelve towers, six of which were 1,000 feet or higher, all located in an area less than a half mile square. Here, Universal's claim that its proposed site is an "antenna farm" because the local fire department has expressed an interest in using the same site lacks merit.

10. In veiw of the foregoing, we cannot accept Universal's contention that the public interest benefits advanced by its proposal entitles it to waiver of our FM allocations standards. These standards were adopted as "go, no-go" criteria after the Commission rejected the previous *ad hoc* approach. Waiving these standards on the basis of non-technical considerations would tend to undermine the allocation system as a whole. In conclusion, we have afforded the waiver request the "hard look" called for under the *WAIT* doctrine, *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), but find that the policy considerations underlying our FM allocations scheme clearly outweigh any future benefits which would accrue if Universal's application were granted. *See North Texas Media, Inc. v. FCC, supra.*

11. Accordingly, IT IS ORDERED, that the application of Universal Broadcasting of Indiana, Inc., for review of the denial of a waiver of 47 C.F.R. § 73.207 IS DENIED, and that the return of application ARN–830225AJ as unacceptable for filing IS HEREBY AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

CATV Carriage, Mandatory Signal
CATV Carriage, On-Channel

Denied petition for reconsideration of the Commission's decision finding that UHF television stations with mandatory carriage rights have no right to demand continued carriage on a specific channel on a cable system under the Commission's on-channel carriage rule.
— *University Television, Inc.*

FCC 85-165

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
UNIVERSITY TELEVISION, INC.	CSR-2362
Petition for Reconsideration	

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1985; Released: July 12, 1985

BY THE COMMISSION: COMMISSIONER RIVERA ISSUING A STATEMENT.

1. The Commission has before it a petition filed on November 30, 1984, by University Television, Inc. (hereinafter UTI), licensee of Television Broadcast Station KUSI-TV (Channel 51), San Diego, California, seeking reconsideration of the Commission's decision in *Monterey Peninsula TV Cable*, 98 FCC 2d 310, *recon. denied*, ____ FCC 2d ____ (October 31, 1984). UTI seeks reconsideration of the above order to the extent that it denied its "Petition for Declaratory Ruling" filed on May 11, 1983. The following parties have filed objections to UTI's request for reconsideration: National Cable Television Association, Cox Cable

San Diego, Inc., and Monterey Peninsula TV Cable, to which UTI has replied.[1]

2. In its petition, UTI asks that the Commission reconsider its finding that the on-channel carriage rule does not prohibit a cable operator from reassigning the channel position of a UHF television broadcast station having mandatory carriage rights once such a station's position on a cable system has been established. In support of its petition, UTI asserts that in reaching the above finding the Commission misconstrued its precedents. UTI contends that the precedents cited by the Commission merely stand for the proposition that a UHF station with mandatory carriage rights may not initially choose its channel position on a cable system. UTI maintains this is substantially different from the question it raised in its original petition: whether a cable system may reassign the channel position of a UHF "must carry" station when such a station's position has been established on a cable system? UTI maintains that a right to a channel position was established in the *First Report and Order in Docket No. 14895,* 38 FCC 683 (1965), and contrary to the Commission's contention was not modified by subsequent Commission actions. Moreover, UTI argues that the policy adopted by the *First Report and Order,* cannot be ignored merely because no rule prohibiting channel reassignments was adopted by the Commission. Furthermore, UTI contends that contrary to the Commission-implied assertion, no technological reason exists as a basis for the refusal of the Commission to require cable operators to obtain the consent of UHF "must carry" stations prior to moving the subject station. Lastly, in response to the Commission's finding that UTI had introduced no evidence that the operation of the present "on-channel" carriage rule has caused UTI or UHF stations in general any harm, UTI asserts that it is axiomatic that reassigning a station's channel position will cause it harm.

3. The objecting parties maintain that UTI's petition fails to provide any basis for reconsideration since it does not raise any new facts or cite any legal authority not already considered by the Commission. They maintain that the Commission has consistently stated that its on-channel carriage rule does not apply to UHF television stations. In this regard, the objecting parties assert that the on-channel carriage rule only applies to stations

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[1] Additionally, Spanish International Corporation, on December 27, 1984, filed comments in support of UTI's request for reconsideration which raise no new issues. These comments are not authorized by Section 1.45 of the Commission's rules, and consequently they will be dismissed.

broadcast over-the-air on channel numbers low enough to correspond with the channel numbers on local cable systems. Furthermore, Monterey Peninsula TV Cable (Monterey) contends that the Commission has recognized that any harm caused to UHF stations by the on-channel carriage rule not being applicable is minimal. Moreover, Monterey notes that in the *First Report and Order*, the Commission concluded there was no way to prescribe a specific rule covering all of the situations possible. *Id.* at 732. Less than a year later, it maintains the Commission made it clear that so long as the "on-channel" carriage rule was met, a cable operator should be free to decide how the channels on its system are to be utilized. *Second Report and Order in Docket No. 14895*, 2 FCC 2d 725, 754 (1966), *Teleprompter Cable Communications Corp.*, 42 FCC 2d 1122 (1973). Monterey points ou that in *Monterey Peninsula TV Cable, supra*, the Commission rejected the right claimed by UTI and again found that UHF stations suffered little if any harm as a result of the present rule. In this respect, it notes that UTI has again introduced no evidence that it has been harmed by the current "on-channel" carriage rule.

4. Additionally, the National Cable Television Association (NCTA) maintains that the logic of UTI's interpretation of Commission precedent is flawed. It asserts that because of the technology involved, regardless of the cable channel position assigned to a UHF station, it will always be different from its over-the-air channel number, and the station will never be able to identify itself to both cable and over-the-air viewers by a single channel number. NCTA points out that while the Commission stated in the *First Report and Order*, that ordinarily changing a must-carry station's channel position once it had been established was undesirable, the Commission specifically declined to incorporate such a provision in its rules. Rather, the Commission agreed to consider such changes on a case-by-case basis promising to examine any charges of abuse upon complaint. Thus, NCTA contends that the Commission might be willing to prohibit the reassignment of a UHF station to a new channel only where it could establish that the change constituted abuse. NCTA maintains that UTI has made no such showing of abuse.

5. In its reply, UTI again asserts its contention that the Commission's original decision relied upon inappropriate precedents. UTI argues that the objecting parties have failed to show that the policy adopted in the *First Report and Order* prohibiting cable systems from reassigning UHF "must carry" stations to new channel positions without their consent has been modified by

subsequent Commission action. Lastly, UTI again maintains that it is axiomatic that the loss of subscribers due to a change in channel position will result in a loss of revenues. Thus, UTI argues that the Commission should reconsider its denial of UTI's request for declaratory ruling.

6. UTI has failed to introduce any evidence which persuades us that our original holding should be reversed. UTI bases its reconsideration request solely upon the language of one of the Commission's earliest decisions regarding the regulation of cable television. *First Report and Order.*[2] In this decision, adopted in April of 1965, the Commission in a brief nine line discussion held that once a "must carry" station's position on the cable system is selected it would ordinarily be undesirable to change it without the station's consent, except to accommodate the signal of a station having a higher priority. *First Report and Order* at 732. However, the Commission concluded that it would not incorporate this standard in any specific rule but would instead examine charges of abuse on a case by case basis. UTI has misconstrued the language of the *First Report and Order*. Contrary to its contention, the mere reassignment of a UHF station with mandatory carriage rights does not constitute abuse. The language of the *First Report and Order*, makes it clear that the Commission was holding that ordinarily changes in channel position were not desirable and charges of abuse would be investigated on a case by case basis. Apart from asserting that its channel position has been changed by one cable system and another cable system has indicated it might change its channel position at some future date, UTI has failed to introduce any evidence of abuse as a result of the switch. Even if loss of audience or revenues were to be considered, such a showing has not been made in this case. Nor has UTI shown that the language in the *First Report and Order* is applicable to UHF "must carry" stations. The language relied upon by UTI arose in the context of cable systems not being able to carry stations on-channel due to material degradation caused either by co-channel interference or too weak a signal at a cable system headend. However, due to the technology employed by cable systems, a UHF "must carry" station cannot be carried on-channel irrespective of the presence of material degradation. Consequently, the language relied upon

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[2] Although this argument is simply repetitive of what was rejected in our initial decision, we believe that some further clarification of this matter is appropriate.

by UTI in the *First Report and Order* was not meant to be applicable to UHF "must carry" stations.

7. Furthermore, in 1972, the Commission adopted a wide-ranging revision and expansion of its 1965 cable television rules. *Cable Television Report and Order*, 36 FCC 2d 143 (1972). Prior to the adoption of this report and order, the Commission's mandatory carriage rules were based upon a hierarchy of priorities which were incorporated in the on-channel provisions of the *First Report and Order*, that UTI relies upon. In the *Cable Television Report and Order*, *supra*, the Commission abolished this regulatory scheme. Unlike the Commission's former rules, the current rules adopted in 1972 did not incorporate a hierarchy of priorities for stations with mandatory carriage rights. No longer did certain stations with mandatory carriage rights have priority over other stations with mandatory carriage rights. See Sections 76.57, 76.59, and 76.61 of the Commission's Rules. Thus, the regulatory underpinning of the language cited by UTI in the *First Report and Order*, no longer exists. Moreover, the Commission since 1972 has consistently found that UHF "must carry" stations are not entitled to any on-channel carriage rights under the Commission's current rules, and any discrimination suffered by UHF stations because they have no such rights is minimal. *Cable Television Service*, 48 RR 2d 553, 557 (1980); *Ausauble Communications, Inc.*, 51 FCC 2d 412 (1978); *Teleprompter Cable Communications Corp.*, 42 FCC 2d 1122 (1973). Lastly, our holding today does not create a dichotomy between UHF and VHF "must carry" stations on the issue presented by UTI. The Commission has never recognized the right of a VHF "must carry" station to demand continued carriage on a certain channel on a cable system when technical reasons prevent it from being carried on the same channel it is broadcast on over-the-air.

8. In view of the foregoing, we find that a grant of University Television, Inc.'s request for reconsideration would not be in the public interest.

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by University Television, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That the comments filed by Sainte Broadcasting Corporation ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

CONCURRING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

Re: Petition of Reconsideration (CSR-2362) filed November 30, 1984 by University Television Inc. (UTI), Licensee of Television Broadcast Station KUSI-TV, San Diego, California

I have previously voiced my objection to piecemeal revision of the must carry rules pending comprehensive review of those rules.[1] This decision works yet another revision by cutting back on UHF stations' established-channel position protection on low band (*i.e.*, VHF) cable channels in a manner detrimental to the carriage rights of UHF stations. I write to say again how objectionable I find this continued "*ad hocery*" and to disagree with the new post-decisional rationalizations contained in this *Order*.

I agree with UTI that, until now, it has been impermissible under the must carry rules for a cable operator arbitrarily to relocate a UHF station from its assigned channel. That protection was established in the *First Report and Order* in Docket No. 14895.[2] This *Order* argues that the *First Report and Order* was not meant to be applicable to UHF 'must carry' stations.[3] While this *post hoc* rationalization clarifies the Commission's current thinking, it cannot be squared with the absence of language suggesting such an intention in either the *First* or *Second Report and Orders* in Docket No. 14895.[4] More than that, the error in the

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[1] *See, e. g., Authorization of Teletext*, 53 R. R.2d 1309, 1333-34 (1983) (Statement of Commissioner Henry M. Rivera in which commissioner Joseph R. Fogarty Joins Dissenting in Part); *Monterey Peninsula TV Cable Reconsideration*, FCC 2d _____ (Oct. 31, 1984) (Separate Statement of Commissioner Henry M. Rivera).

[2] *See Rules re Microwave Served CATV*, 38 FCC 638 (1965) (*First Report and Order*). Petitioner contends the *First Report and Order* prohibits arbitrary relocation of UHF stations once they are assigned a dial position on a cable system. Though the *First Report and Order's* discussion of this policy was not extended, its brevity suggests that the Commission's intention was so clear and unequivocal that lengthy explanation was unnecessary. *See* note 6, *infra*.

[3] The statement in paragraph 6 of the *Order* that ". . . UTI [has not] shown that the language in the *First Report and Order* is applicable to UHF must carry stations . . ." seems to suggest that in setting television policy, unless the Commission explicitly mentions the term "UHF," our rules and regulations should be read to apply only to VHF television. If true, such a policy would negate for UHF television dozens of regulations and cases that have always applied to VHF and UHF television stations alike. *See, e. g.*, 47 C.F.R. Secs. 73.645 and 73.1850 *Et. Seq.*

[4] *See generally First Report and Order*, 38 FCC at 732; *Second Report and Order* in Docket No. 14895 (*Second Report and Order*), 2 FCC 2d 725, *Cf. St. Johnsbury Community TV Corp.*, 52 FCC 2d 1039, 1044 (1975); *Ausable*

Commission's analysis is plain as a matter of logic. The must carry rules were adopted in part out of concern for the survival of local UHF stations. Although on-channel carriage is clearly the best way to assist local stations, stability of channel position (in order to help stations establish a local identity) is a next best alternative when on-channel carriage is technically infeasible (as in the case of UHF stations). Applying the must carry rules to protect UHF stations from arbitrary relocation from established dial positions is the only interpretation of Docket No. 14895 consistent with the purpose and structure of the must carry rules. The new "gloss" placed on these earlier FCC decisions is also contrary to another, basic purpose of the must carry rules — to assure access to local viewers by local stations — because it imposes the burden of requesting access to UHF must carry stations upon viewer's rather than requiring a cable system to provide that access automatically. Changed circumstances may now justify modification of must carry to permit a more marketplace driven system of channel assignment priorities, however, any such changes do not justify the implausible interpretation of the Commission's original intent in Docket No. 14895 announced in this *Order*.

This *Order* also dismisses UTI's petition for failure to come forward with evidence of "abuse as a result of the [channel] switch." The petition may be deficient in this respect. Any such deficiency, however, is not a persuasive reason for the Commission's refusal to act. First, the Commission's original policy regarding channel position protection contemplated more than merely prohibiting "abuse."[5] The *First Report and Order* in Docket No. 14895 contemplated protection of both VHF and UHF stations' established dial position, and the *Second Report and Order* said nothing to the contrary.[6] Second, a thoroughly pled case of abuse was in any event already before the Commission in

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Communications, Inc., 51 FCC 2d 412, 413 (1975).

[5] "Moreover, once a channel position on the cable is selected *we do not believe it should ordinarily be changed without the station's consent*, except to accommodate the signal of a station having higher claims, because it placed a higher grade signal over the CATV community" (emphasis added), *First Report and Order*, 38 FCC at 732.

[6] The *Second Report and Order* deleted specific channel assignment priorities, but nothing in that decision suggests an intention to permit arbitrary relocation of stations already on cable systems. "Thus the carriage requirements made applicable to all CATV systems will be substantially the same as those applied to microwave systems by the Commission's first report, ..." 2 FCC 2d at 754. *See also* note 8 *Infra*.

the earlier phases of this proceeding to no avail.[7]

It seems evident from the cavalier manner in which the *Order* dismisses UTI's petition that the Commission intends a *de facto* repeal of the must carry protection afforded UHF television stations wherever possible without facing the political cost of openly deleting the rules.[8] The time has long passed for the Commission to address the entire must carry question directly.

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[7] *See Monterey Peninsula TV Cable Reconsideration.* ____ FCC 2d ____ (October 31, 1984). *See also, Seperate Statement of Commissioner Henry M. Rivera* Mimeo # 35322 (December 6, 1984). In our earlier ruling we permitted Monterey to relocate a UHF station even though: (1) only 37% of the cable system's subscribers had installed decoders needed to view the UHF station at the new location; (2) the UHF station was placed on decoder channel 78 even though its over-the-air channel number was 35 and, (3) the cable system had an economic interest in the station added to the more desirable basic tier that displaced the originally assigned UHF. If this anticompetitive, retaliatory and arbitrary conduct does not constitute abuse, I doubt any conduct could.

[8] I have no quarrel with the *Order's* statements regarding the absence of an absolute right of UHF stations to demand on-channel carriage (either on their over the air frequency or on their over the air channel number) when that UHF station initially comes on the air initially. Petitioner is not asking for carriage on-channel. It seeks continued carriage on its established VHF dial position that the cable system had voluntarily assigned to it. The *Order's* statement regarding "technical reasons" preventing UHF on-channel carriage is, therefore, gratuitous.

Comparative Hearing
Ownership and Management, Integration of
Real Party in Interest
Television Station, Authorization

Review Board affirmed *I.D.* television grant, after denying real party-in-interest exceptions and awarding slight to moderate integration preference (98% v, 75%) over closest competitor. Discredited integration proposals involving: failure to implement previous commitment; no "legitimate interest and influence"; variance; inconsistency with cellular radio commitment; vagueness; active "limited" partners.
— *Utah TV Assn. Ltd.*
MM Docket 84-101

FCC 85R-98

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

UTAH TELEVISION ASSOCIATES LIMITED PARTNERSHIP Salt Lake City, Utah	MM Docket No. 84-101 File No. BPCT-801217KI
INTERMOUNTAIN BROADCASTING, INC. Salt Lake City, Utah	MM Docket No. 84-102 File No. BPCT-810310KE
SALT LAKE CITY FAMILY TELEVISION, INC. Salt Lake City, Utah	MM Docket No. 84-103 File No. BPCT-810511KK

Joseph C. Lee, George L. Gonzales, et al., General Partners, d/b/a MOUNTAIN WEST TELEVISION COMPANY Salt Lake City, Utah	MM Docket No. 84-104 File No. BPCT-810511KL
WEST VALLEY CITY TELEVISION ASSOCIATES, LIMITED PARTNERSHIP West Valley City, Utah	MM Docket No. 84-105 File No. BPCT-810511KM
For a Television Construction Permit	

Appearances

Joseph F. Hennessey, *Thomas L. Siebert*, and *Paula A. Argento*, for Utah Television Associates Limited Partnership; *David Tillotson* and *Craig Iscoe*, for Intermountain Broadcasting, Inc.; *David D. Oxenford*, *Grover C. Cooper*, and *Janet M. Evans*, for Salt Lake City Family Television, Inc.; *Barry D. Wood* and *Kenneth D. Shirley*, for Mountain West Television Company; *Edward S. O'Neill*, *Chase C. Libby*, and *Gary P. Schonman*, for West Valley City Television Associates, Limited Partnership; and *Norman Goldstein*, for the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: December 2, 1985; Released: December 10, 1985

BY THE REVIEW BOARD: MARINO (Chairman), JACOBS, BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. This is a five-party comparative proceeding to select one applicant to construct a new commercial VHF television station to operate on Channel 13 at Salt Lake City or nearby West Valley City, Utah. Following a trial-type hearing, presiding Administrative Law Judge Kuhlmann (ALJ) issued an Initial Decision (I.D.), FCC 85D-34, released May 20, 1985, in which he granted the

application of Salt Lake City Family Television, Inc. and denied the four remaining applications. Each of the five applicants filed exceptions to the I.D. with the Review Board; all applicants and the Mass Media Bureau filed replies. We have reviewed the case in light of their pleadings, the oral argument held October 10, 1985, the contingent request to reopen the record filed by Intermountain Broadcasting, on September 25, 1985, and our independent examination of the record. In essence, we adopt the ALJ's findings of fact and conclusions of law, after considering all decisional exceptions, and affirm his conclusion that a grant of Salt Lake City Family's application is mandated by established comparative factors.

2. *Background*: After a full comparative hearing, Salt Lake City Family (Family) was ultimately found to be the superior comparative applicant because "its 98% owners, Rebecca Hewgley and Patrick Crants" were entitled to credit for proposing to participate full time on a daily basis in the management of the station, a substantial comparative factor, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1909 (1965). The closest competitor, Mountain West, was awarded credit for 75% ownership participation, but its qualitative attributes, even if greater, were not sufficient to outweigh Family's clear (23%) quantitative superiority. I.D., paras. 160-161. Specific findings and conclusions were also made by the ALJ about the remaining applicants, but their proposals were found to be quantitatively inferior: Utah Television received "no credit," I.D. para. 157; Intermountain's proposal "will also not be credited," *id.*, para. 158; and West Valley received "at best only 50%" credit, *id.*, para. 159.

3. In their exceptions the four unsuccessful applicants all urge that the ALJ erred in awarding Family 98% integration credit, renewing their claim that the proposed ownership integration of Family's Rebecca Hewgley and Patrick Crants is a "sham" since they are not the real parties in interest to the Family application. See paras. 4–11 below. All of the unsuccessful applicants also urge that their own integration credit should be significantly increased, paras. 12–25.

4. *Sham and Real Parties in Interest*: Both during the hearing and in a subsequent petition to reopen the record for a further hearing, Mountain West, supported by Family's other competitors, attempted to show that Rebecca Hewgley and Patrick Crants were not the real owners, or in control, of the Family application. Their contentions and the relevant record evidence

were fully reviewed by the ALJ in his Initial Decision, paras. 61-72, 137-147. They now renew these contentions, having failed to persuade the ALJ who had the opportunity to observe the witnesses, review the evidence, and consider their contentions in the light of controlling precedent. *See KIST Corp.*, 99 FCC 2d 173, 57 RR 2d 49 (Rev. Bd. 1984), *aff'd and modified*, 58 RR 2d 1483 (1985).

5. In its exceptions, Mountain West (Br. at 14-37) claims that the ALJ should have rejected "Family's integration proposal because of the manipulative presence of Jack Dalton" (Rebecca Hewgley's uncle) who had been involved in the *KIST* case, *supra*. It also urges that the ALJ erred when he "closed his eyes to the link between Family and Media Central, Inc." (a broadcast station management company), that Hewgley allegedly misrepresented the involvement of Doctor Crants, Patrick's brother, in the Family application and his involvement with Media Central. In sum, Mountain West's thesis is that Jack Dalton and Doc Crants are really in control of Family. Family replies that these contentions "constitute nothing more than pandering to certain suspicions" expressed by this Board in several past cases, see *Cascade Video of Oregon, Ltd.*, 99 FCC 2d 1001, 1005, 56 RR 2d 452, 455 (Rev. Bd. 1984); *Channel 63, Inc.*, 57 RR 2d 1597 (Rev. Bd. 1985); *KIST, supra*. They rest merely on "guilt by association — or perhaps more accurately here — guilt by relation," and that the record evidence in this case "fairly and dispassionately evaluated on its own merits" supports the ALJ's findings and conclusions. Reply at 1-13.

6. This Board has expressed continuing concern about the genuineness of certain questionable integration proposals, and the role played in those cases by Jack Dalton, Sterling Communications, Inc. and Media Central. For example, in *Cascade, supra*, the Board remanded for a further hearing when substantial and material questions were raised as to whether the alleged integrated owners would actually manage the station or might instead enter into a full-service management agreement with Media Central. In *Channel 63, Inc., supra*, the case was settled, but in a special separate statement the Board Members pointed to the very questionable integration proposal of the dismissing applicant, noted the presence of Sterling Communications, which also had been involved in *KIST* and *Cascade, supra*, and "urge[d] our Administrative Law Judges to familiarize themselves with the *dramatis personae* . . . [in the past cases] with an eye toward very

close scrutiny in future cases with those parties in the cast or in the wings." 57 RR 2d at 1599.

7. The Board's special alert in *Channel 63* was heeded in this case and, as the ALJ observed, apparently "resulted in an aura of skepticism about any project that involves Mr. Dalton, and, perhaps . . . the consultant Sterling Communications and Media Central." I.D., para. 141. We do agree with the ALJ's further observation that "the relationship of Ms. Hewgley and Mr. Crants to these entities must be judged on the facts presented in this proceeding, not those elicited in another case where the relationships were different." I.D., para. 141. Our review of the record and Initial Decision has convinced the Board that the ALJ did engage in a thorough, critical but objective review of the factual record about the integration proposals of both Family and all the other applicants in this case. The record supports his conclusion that the Family proposal does not resemble *KIST*, except for a few superficial similarities.

8. *KIST* has now become the leading authority on the subject of whether ownership proposals reflect good faith business arrangements, or whether real control resides elsewhere requiring that ownership integration credit not be awarded for comparative purposes. There we and the Commission refused to credit the alleged 95% ownership of a black woman because: (a) she had received the stock as a gift from Jack Dalton, "a near stranger"; (b) she had not been involved significantly in the preparation of the application, nor was she likely to be involved in station affairs in the future as an owner; (c) she was not involved in obtaining financial commitments; (d) she failed to contribute any capital to the enterprise or to incur any financial obligation; and (e) there was an absence of any written agreement spelling out how corporate authority would be exercised and how company loans would be repaid. Finally, the Commission pointed out that "Mr. Dalton has clearly dominated the affairs of this corporation despite his minimal 5% stock ownership and has largely ignored the corporate form" and the woman's alleged 95% ownership interest. 58 RR 2d at 1486 Note 11.

9. As previously noted, the ALJ set forth his findings and conclusions regarding this matter in considerable detail in his Initial Decision; it is therefore only necessary to highlight the key or objective factors which lead us to affirm his judgment to credit fully the integration proposals of Hewgley and Crants. At the hearing, the competing applicants tried to show that Family's control by Hewgley and Crants was "suspect" because of Jack

Dalton's connection with the application. But the ALJ found that, unlike his role in the *KIST* case, here "Mr. Dalton no longer holds any interest," that "he has not provided any funds, and he no longer guarantees the loan from Commerce Union Bank." Hewgley, his niece, owns 47% of the stock, and has nearly a decade of broadcast experience. I.D., para. 140. It was she who had first told Dalton of her interest in applying for a television station; Dalton did suggest Channel 13 and the Sterling Communications consulting firm to her. I.D., para. 63. Hewgley arranged for bank financing, but Dalton's friendship with a bank officer did assist her in securing the loan. I.D., para. 64. However, both Hewgley and Crants are committed to guaranteeing the loan, and the bank has provided them with a line of credit to pay current expenses. I.D., para. 65. Very early in the proceeding, after meeting with their Washington lawyers, Hewgley and Crants fired Sterling Communications. I.D., para. 66. These and other findings set out in the Initial Decision support the ALJ's conclusion, which we affirm, that Dalton's "past ties to the [Family] applicant have been to offer its principals advice and, at one point, to guarantee its financing. His actions have not been at all surprising when his long-standing relationship with its principals is considered. *Family has, at all times, been straightforward about his ties.*" I.D., para. 140 (emphasis added).

10. Belatedly, after the record was closed, Mountain West sought a further hearing to show that Dalton and Doctor Crants, Patrick's brother, would actually control Family through a management agreement between Media Central and Family. I.D., paras. 142–143. After considering these allegations in light of the testimony in this record (I.D., paras. 143 note 19 and 145 note 21), as well as the testimony in the *Cascade* remand proceeding (I.D., para. 145), the ALJ rejected these arguments for procedural and substantive reasons. I.D., paras. 142–146. We find these reasons to be sound and persuasive and therefore affirm his denial of the belated petition to reopen the record.

11. We also affirm the ALJ's related denial of Mountain West's equally belated request for addition of a financial qualifications issue against Family both for the reasons given at I.D., para. 146, and because Mountain West has failed to specifically allege facts that would raise a substantial and material question as to whether Family has funds available to meet its costs of construction and three-months operation. *See The News-Sun Broadcasting Co.*, 27 FCC 2d 61, 62, 20 RR 2d 1084, 1085 (1971); *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166,167 (1980). By contrast,

in *Dutchess Communications Corp.*, FCC 85R-22, released March 22, 1985 (Rev. Bd.), we required supplementation because the applicant had, in response to a financial issue, submitted a bank letter conditional on "the pledging of acceptable collateral" and "acceptable loan guarantees," with no indication of what would be "acceptable." Record evidence there had established that the applicant never applied for the bank loan and had no previous relationship with the bank; instead, the bank letter was issued in response to an inquiry by a principal's kinsman who had prior dealings with the bank. The bank issued the letter before it ever received written financial statements from the applicant; it did not respond once it later received the information. The supplementation confirmed the Board's suspicions that the bank letter was not a good faith loan commitment, but instead was issued merely as an accommodation to the kinsman. *Decision*, 101 FCC 2d 243, 247-249, 58 RR 2d 381, 384-386 (Rev. Bd. 1985). Here, Mountain West's request for a financial issue against Family was first raised after completion of the hearing and its allegations lack adequate record support to comprise a *prima facie* case because the applicant directly negotiated its loan commitment with the bank and the loan terms require specific collateral.

12. *Participation of Ownership in Management: Family*. As essentially a corollary to Mountain West's sham and real parties in interest issues discussed above, exceptions have been filed which urge that no integration credit be awarded to Family because former principals Jack Dalton and Erma Freeman (who had prepared the application) allegedly controlled, or continue to control, the applicant. Mountain West Br. at 35-37; Utah Television Br. at 17-18. We deny these exceptions. First, we have considered the Mountain West argument and found it wanting. See paras. 6-11, above. Second, the ALJ fully and correctly considered the matter and determined that Rebecca Bain Hewgley (47% owner) and Patrick David Crants (51% owner) are the true and actual controlling principals of Family. I.D., paras. 61-72, 137-147. Moreover, no doubt has been raised about Patrick Crants' fulltime general manager responsibilities which entail supervision and overall responsibility for all aspects of station operation and primary supervisory responsibility with respect to sales, budgeting, finances, legal compliance, equal employment opportunity compliance, employment, negotiations with suppliers, and community relations. Similarly, Ms. Hewgley's fulltime station manager responsibilities involve direct supervision over all programming matters. See Family Exhs. 2 and 3. These are

managerial functions traditionally recognized as meriting ownership participation credit, *see Policy Statement, supra*, 1 FCC 2d at 395, 5 RR 2d at 1909-1910. Nor has any question been raised concerning their abilities to effectuate these proposals. *Cf. Berryville Broadcasting Co.*, 70 FCC 2d 1, 11-12, 44 RR 2d 1325, 1337-1338 (Rev. Bd. 1978).

13. *Utah Television.* Utah Television's proposal to integrate principals G. Andrew Lawrence (44.66% owner), Dennis Valenzuela (32.66% owner), and Richard S. McKnight (11.33%) into fulltime managerial roles was not creditable, the ALJ found. I.D., paras. 13-32, 118-131. In particular, the ALJ found that Mr. Lawrence was unlikely to effectuate his proposal because he had failed to keep a previous promise, made in another comparative proceeding, to relocate from Alexandria, Virginia, where he operates a consulting firm, to Craig, Colorado to serve as general manager of an FM station. *Id.*, paras. 119-120. The FM application was granted pursuant to a settlement agreement filed in the Craig, Colorado proceeding. *Id.* Also, the ALJ found that Mr. Valenzuela had no *de facto* legal responsibility as a putative owner and would exercise no day-to-day managerial and policymaking duties. *Id.*, paras. 123-128. Finally, Mr. McKnight's post-"B" cut-off date change of heart to become station business manager — he was specifically not included in a comprehensive list of managers that the applicant filed on the "B" cut-off date — was a "variance" from the application and could not be credited. *Id.*, paras. 129-131.

14. Utah Television excepts to the I.D.'s disallowance of ownership participation credit for Messrs. Lawrence, Valenzuela, and McKnight and claims a total of 88.7% credit. Br. at 8-16. It states that Mr. Lawrence, who is a 44.66% owner of the applicant and is proposed as fulltime general manager, testified that he and his wife would move to Salt Lake City if the application were granted, that he has no agreements or understandings that would prevent him from fulfilling his pledge to move, and that he would move the place of business of his firm, the Lawrence Company, which performs consulting for the Pentagon and manages his own and his wife's investments, from Alexandria, Virginia to Salt Lake City. *Id.*, at 8-9. It urges that Mr. Lawrence's failure to implement his Craig, Colorado relocation and integration pledge should not discredit his instant promise to move to Salt Lake City because the Craig "case settled before hearing, and the circumstances changed." *Id.*, at 9.

15. We deny this exception regarding Mr. Lawrence. As the ALJ found, I.D., para. 32, the only "change in circumstance" was a settlement which resulted in the grant of the Craig, Colorado application in which Mr. Lawrence and his wife held a 10% joint ownership interest. Tr. 35, 64–65. Recently in another case, the Board significantly diminished the integration credit accorded an applicant whose sole owner had promised to divest her ownership interest in, and to resign as general manager of, another television station whose construction permit was granted only 5 months earlier pursuant to a settlement agreement. *Houston Family Television, Ltd.*, 58 RR 2d 1557, 1562–1564 (Rev. Bd. 1985). Here the situation is more egregious in that Mr. Lawrence made no attempt whatsoever to implement his integration commitment to the Commission, despite the fact that the permanency of such commitments is a substantial public interest factor in the Commission's comparative process. *See Policy Statement, supra.* We affirm the ALJ's determination that the appropriate response here is to award Utah Television no credit (0%) for Mr. Lawrence's proposed integration.

16. With respect to Mr. Valenzuela (32.66% owner), Utah Television urges that it should have received ownership participation credit for his proposed role as fulltime director of news and public affairs. Br. at 10–15. It seeks to excuse weaknesses in his testimony because it was Mr. Valenzuela's first time testifying. *Id.*, at 10. It claims that the record shows that Mr. Valenzuela understood the nature of his role, that he partook in a meaningful way in decision-making as a 49% owner and secretary/treasurer in Utah Television Enterprises Corp. (UTEC), which is apparently a two-thirds voting general partner in the applicant, and that his ignorance of UTEC's books and records despite his position as secretary/treasurer is excused by UTEC's dormancy.

17. We deny this exception. The ALJ fully considered the record, including Mr. Valenzuela's testimony (Tr. 94–149) and demeanor, made extensive findings concerning his passive role in unquestioningly assenting to key decisions that were already made by the other UTEC owners, the emptiness of any meaningful duties in his role as UTEC secretary/treasurer, his primary interest in supplementing his retirement income by working at the proposed station and concomitant lacks of focus on and understanding of his ownership role and responsibilities, and his failure to have any understanding of what his proposed news director role would entail. I.D., paras. 19–25, 121–128. The ALJ's findings demonstrate that Mr. Valenzuela will not have "a legitimate

interest and influence in the [applicant] to warrant our confidence that his participation in the station's operations will be consistent with the purposes behind the integration criterion." *See KIST Corp., supra*, 58 RR 2d at 1485–1486; *Policy Statement, supra*, 1 FCC 2d at 395, 5 RR 2d at 1909.

18. Finally, we affirm the ALJ's conclusion that Utah Television should receive no ownership participation credit for 11.33% owner Richard S. McKnight's belated, post-"B" cut-off date proposal to serve as business manager of the proposed station. See I.D., paras. 26–29, 129–131. *Northland Communications*, 58 RR 2d 825 (Rev. Bd. 1985), relied upon by Utah Television, is not applicable. That case credited an integration proposal, set forth on the "B" cut-off date, which was contingent on the dismissal of another application where the applicant subsequently reported prior to the date set for exchange of integration proposals that the latter application had been dismissed. In *Northland*, we specifically stressed that we were not departing:

> from current Commission policy or the general prohibition against post "B" cut-off date upgrading since the freeze on comparative positions as of that date in reality only pertains to that information that can readily be gleaned from an examination of the application. For example, an applicant still will not be able to claim participation credit for an individual who becomes a principal after the "B" cut-off date; nor can an applicant upgrade its quantitative credit when a participating principal's ownership percentage increases after the "B" cut-off date.

Id. at 827. Nor does *Northland* change the traditional rule that an applicant who voluntarily sets forth its entire integration proposal by the "B" cut-off date may not subsequently vary or improve that proposal to the prejudice of its opponents. Here, there is no serious dispute that by the "B" cut-off date Utah Television had filed a complete integration proposal that did not include Mr. McKnight, Tr. 152, 210. Mr. McKnight's proposal to be business manager was not advanced until the exhibit exchange date. Thus, his participation was a new proposal that varied from Utah Television's previous proposal that excluded him from an active station management role. Therefore, we affirm the ALJ's rejection of any integration credit based on Mr. McKnight's proposed role. *See Leflore-Dixie, Inc.*, 100 FCC 2d 331, 334–335, 57 RR 2d 1115, 1158 (Rev. Bd. 1985). In sum, Utah Television is not entitled to ownership participation credit.

19. *Intermountain*. Intermountain's proposal that 55% owner David R. Williams and his wife and 45% owner Deanna M. Williams work full time respectively as general manager and

business manager/personnel manager of the station was not credited by the ALJ. See I.D., paras. 37-58, 132-136. He found that they had concurrently and inconsistently promised to be integrated full time at the proposed Salt Lake City television station and at the cellular mobile telephone system that they proposed to construct to serve the Salt Lake City/Ogden Utah metropolitan statistical area. Intermountain did not disclose its cellular proposal in this proceeding. Consequently, the ALJ awarded Intermountain no integration credit and assessed it a comparative demerit for its failure to report the inconsistent cellular proposal.

20. Intermountain excepts to both its receipt of no integration credit, Br. at 4-15, and the assessment of a comparative demerit against it for lack of good faith, *id.* at 15-16. It does not deny that it had two inconsistent proposals on file but basically claims that "the Williamses made their television integration commitment in good faith [and] always considered that commitment paramount and intended to honor it." *Id.* at 4. We affirm the ALJ's disallowance of any integration credit to Intermountain. Regardless of the Williamses' subjective intent to make the cellular proposal secondary to the television one, the fact remains that on the date integration proposals were tendered in this proceeding — when the Williamses stated unequivocally that they would work full time at the proposed television station — they had on file with the Commission an inconsistent cellular application that contained an unequivocal commitment for them to work full time at the proposed cellular system. Therefore, on that key date on which the competing applicants and the Commission were entitled to rely upon Intermountain's expressed integration commitments, *see Northland Communications, supra*, 58 RR 2d at 827; *Northern Sun Corp.*, 100 FCC 2d 889, 891, 57 RR 2d 1550, 1552 (Rev. Bd. 1985), *recon. denied*, 100 FCC 2d 1440, Intermountain had outstanding two proposals which were inconsistent, equally unequivocal, and perforce mutually contingent. In short, its integration proposal here is too "conditional and uncertain" an undertaking to be credited.

21. We have also considered the comparative demerit assigned to Intermountain in light of its claim of confusion in its dealings with cellular counsel and counsel's apparent confusion as exemplified in his affidavit attached to Intermountain's contingent request to reopen the record. In view of our previous ruling that Intermountain is entitled to no integration credit, the demerit based on its lack of "good faith" reporting, I.D., para. 136, is not

decisionally significant, and therefore this matter is moot and does not require further consideration.

22. *Mountain West.* Of four equal voting general partners in Mountain West, three were recognized by the ALJ as meriting fulltime ownership participation credit (*i.e.*, 75% in total): Sid W. Foulger, proposed general manager; Joseph C. Lee, station manager; and Jo-Ann Wong, program director. See I.D., paras. 75-95, 148-151. Significantly, the ALJ disallowed ownership participation credit for general partner George L. Gonzales, proposed as fulltime public affairs director, because he found no reliable evidence to demonstrate that Mr. Gonzales would be a fulltime manager. *Id.*, paras. 150-151.

23. In its exceptions, Mountain West claims that Mr. Gonzales' proposed integration should have been credited. Br. at 3-8. It claims that the ALJ's contrary conclusion "is absolutely without the slightest basis," *id.* at 3. It points to Mr. Gonzales' written testimony that he "will serve fulltime as Channel 13's Community Affairs Director, devoting a minimum of forty hours per week to this position. . . . direct[ing] the production of all community affairs programs and will serve as Chairman of the Community Relations Committee. . . . includ[ing] directing the community ascertainment process." Mountain West Exh. 4 at 3. However, we have reviewed Mr. Gonzales' oral testimony at hearing, Tr. 579-689, and find that it undercuts totally his purported fulltime managerial role. His oral testimony specifically reflected only that he would produce a single half-hour show per week which, including time for preparation, would involve only some two hours per week, and he was unable to specify any managerial or policy-making duties which would permit him to claim a 40 hour per week commitment to the station. We affirm the ALJ's conclusion that his proposal was too slight and too vague to deserve any credit. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 839, 50 RR 2d 1117, 1125 (Rev. Bd. 1981), *remanded on other grounds*, 93 FCC 2d 1275, 53 RR 2d 1004 (1983) (Comm'n); *compare Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 267, 56 RR 2d 275, 279-280 (Rev. Bd. 1984), *review denied in pertinent part*, 57 RR 2d 1390 (1985), *appeal pending sub nom. Spectrum Telecommunications Corp.* v. *FCC*, No. 85-1249 (D.C. Cir. filed April 18, 1985) (no integration credit for Mr. Officer, typical broadcast employee with programming responsibilities) *with id.* at 267-268, 57 RR 2d at 280 (credit for Ms. Wilson and Mr. Crawford, who will exercise managerial discretion and make policy); *cf. KIST Corp., supra* (no credit

where "legitimate interest and influence" lacking). Finally, Intermountain's exception to the ALJ's recognition of Jo-Ann Wong as a participating owner of Mountain West is not of decisional significance, and we affirm the award of 75% credit to the applicant.

24. *West Valley.* West Valley received credit for proposing that its two general partners, Lela M. Ence and Robert S. Fotheringham, work fulltime as general manager and general sales manager/director of promotion, respectively, at the station. Although recognizing that West Valley was a *de jure* limited partnership, the ALJ nevertheless found that its two limited partners, H. Roger Boyer and Kem C. Gardner, had functioned and would continue to function as active controlling owners of the partnership, and therefore diminished West Valley's integration credit to "at best only 50%". I.D., para. 159; see *id.*, paras. 97-108, 152-155.

25. In its exceptions, West Valley seeks 100% integration credit, urging that its limited partners would not share in the day-to-day control of West Valley. West Valley Exceptions at 7-28. We affirm the ALJ's ruling which is amply supported by his findings. For example, the limited partners have thus far participated in all partnership decisions, with Mr. Boyer involved in a manner similar to his past participation in another Salt Lake City television station where he was a voting shareholder, officer and director. I.D., para. 98. Mr. Boyer keeps all partnership books and records, including the checkbook, and neither general partner is authorized to sign checks. *Id.*, para. 101. In short, there is no evidence of *actual* insulation of the limited partners from partnership management; they have an active managing role which is no less weighty than that of the "general" partners and should be treated as if they held at least half of the partnership's decisionmaking authority. *Cf. KIST Corp., supra* (5% owner treated as controlling owner). This view is reinforced by recent Commission emphasis that limited partners be passive in order to avoid attribution of their media ownership interests to the partnership. *Cf. Chester Associates*, FCC 85R-71, released August 28, 1985 (discussing the Commission's *Ownership Attribution*, 58 RR 2d 604, 613-620 (1985)). Therefore, like the ALJ, we shall consider West Valley as having 50% ownership integration credit.

26. *Diversification of Mass Media Control.* Utah Television was assessed a very slight demerit largely because G. Andrew Lawrence, one of its two general partners (and general manager of Utah Television's other general partner), owns a 10% interest in

the licensee of Station KQZR-FM, Craig Colorado. I.D., paras. 33, 114-115, 156. The other applicants were found to have no attributable media ownership interests. I.D., paras. 59-60, 73-74, 96, 109, 116-177, 156. In its exceptions, Mountain West points out that on the "B" cut-off date Jack Dalton and Erma Freeman each owned a 1% interest in the Family applicant and that Mr. Dalton held a one-third limited partnership interest in the permittee of a television station in Springfield, Missouri and Ms. Freeman owned 2% of the permittee of an unbuilt television station in Reno, Nevada. Br. at 38. While conceding that under normal circumstances such small "ownership percentages . . . might lead to assessment of only a very slight demerit" against Family, Mountain West alleges that the involvement of these former principals in Family was disproportionately greater than their equity interests and that therefore "a slight to moderate demerit" should be assessed. *Id.* at 40.

27. We deny this exception. Mountain West's bid to magnify Family's attributable interests based on "disproportionate involvement" of its former principals is unsupported by precedent. *Cf. KIST Corp., supra,* 99 FCC 2d at 195-196, 57 RR 2d at 65-66 (Riverside Family applicant given "very slight diversification" demerit because Mr. Dalton had both *de facto* control of the applicant, a key factor missing in the instant case, as well as the limited partnership interest of which Mountain West here complains). Because Ms. Freeman's ownership interests in the applicant and the Reno station, as well as Mr. Dalton's ownership interest in the applicant, were so minute, and because Mr. Dalton's ownership interest in the Springfield television station is a limited partnership interest only, we agree with the ALJ that Family's attributable interests are *de minimis* and thus warrant no demerit. See I.D., para. 116. *See Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 987, 55 RR 2d 926, 929 (1984); *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 1049, 51 RR 2d 1604, 1606-07 (Rev. Bd. 1982); *Cleveland Television Corp.*, 91 FCC 2d 1129, 1139, 52 RR 2d 581, 588 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983, *aff'd*, 732 F.2d 962 (D.C. Cir. 1984). Finally, Mountain West's argument that "Family's standing under the diversification criterion is further clouded by the presence of Doc Crants," an alleged real party-in-interest, is not supported by the record, as the ALJ correctly concluded, see paras. 4-11, above. Its exception, Br. at 44-46, directed at West Valley's diversification standing is non-decisional in light of our ultimate conclusion.

28. *Comparative Summary*. We have considered all decisionally significant exceptions and have affirmed the ALJ's awards of quantitative integration credit to the various applicants: (1) Family, 98%; (2) Mountain West, 75%; (3) West Valley, at most 50%; (4) Utah Television and (5) Intermountain, 0% apiece. Family's obvious quantitative differences are sufficiently large that they cannot be overcome by differences in the applicants' qualitative enhancement factors. *New Continental Broadcasting Co., supra*, 88 FCC 2d at 850, 50 RR 2d at 1133 (12.5% difference is sufficient); *see also Metro Broadcasting, Inc.*, FCC 85-558, released October 18, 1985 (Comm'n), at para. 2, *affirming* 99 FCC 2d 688, 703, 57 RR 2d 440, 451 (Rev. Bd. 1984) (10.8% edge is probably sufficient). Family is entitled to a slight to moderate integration preference over Mountain West, *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 495, 497, 55 RR 2d 1299, 1306, 1307 (Rev. Bd. 1984), *recon. denied*, 56 RR 2d 1260, *review denied*, 58 RR 2d 439 (1985) (Comm'n) (96.4% to 73% edge warrants slight to moderate preference), and substantial preferences over the remaining applicants. Therefore, we affirm the ALJ's ultimate conclusion that a grant of the Family application will best serve the public interest, convenience, and necessity.

29. ACCORDINGLY, IT IS ORDERED, That the motion to strike filed July 29, 1985 by Intermountain Broadcasting, Inc. IS GRANTED, and that the statement at page 9 of the reply exceptions filed by Mountain West Television Company IS STRICKEN; and

30. IT IS FURTHER ORDERED, That the contingent request to reopen the record filed September 25, 1985 by Intermountain Broadcasting, Inc. IS DISMISSED; and

31. IT IS FURTHER ORDERED, That the petition for leave to amend filed October 3, 1985 by Mountain West Television Company IS DENIED, and the amendment IS REJECTED; and

32. IT IS FURTHER ORDERED, That the motion to correct transcript filed November 4, 1985 by Mountain West Television Company IS GRANTED; and

33. IT IS FURTHER ORDERED, That the application of Salt Lake City Family Television, Inc. (File No. BPCT-810511KK) for a construction permit for a new television station at Salt Lake City, Utah IS GRANTED subject to the conditions set forth in paragraphs 27 and 31 of the hearing designation order, Memorandum Opinion and Order, Mimeo No. 2294, released February 10, 1984, and that the applications of Utah Television Associates Limited Partnership (File No. BPCT-810217KI), Intermountain

Broadcasting, Inc. (File No. BPCT-810310KE), Mountain West Television Company (File No. BPCT-810511KL), and West Valley City Television Associates, Limited Partnership (File No. BPCT-810511KM) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

UTAH TELEVISION ASSOCIATES LIMITED PARTNERSHIP Salt Lake City, Utah	MM DOCKET NO. 84-101 File No. BPCT-801217KI
INTERMOUNTAIN BROADCASTING, INC. Salt Lake City, Utah	MM DOCKET NO. 84-102 File No. BPCT-810310KE
SALT LAKE CITY FAMILY TELEVISION, INC. Salt Lake City, Utah	MM DOCKET NO. 84-103 File No. BPCT-810511KK
Joseph C. Lee, George L. Gonzales, et al., General Partners, d/b/a MOUNTAIN WEST TELEVISION COMPANY Salt Lake City, Utah	MM DOCKET NO. 84-104 File No. BPCT-810511KL
WEST VALLEY CITY TELEVISION ASSOCIATES LIMITED PARTNERSHIP West Valley City, Utah	MM DOCKET NO. 84-105 File No. BPCT-81051KM

For a Television Construction Permit

Appearances

Thomas L. Siebert and *Paula A. Argento* on behalf of Utah Television Associates, Limited Partnership; *David Tillotson*, *Craig Iscoe*, and *Gerald Stephens-Kittner* on behalf of Intermountain Broadcasting, Inc.; *Grover C. Cooper*, *David D. Oxenford*, and

Janet M. Evans on behalf of Salt Lake City Family Television, Inc.; *Barry D. Wood* and *William B. Baker* on behalf of Joseph C. Lee, George L. Gonzales, et al., General Partners, d/b/a Mountain West Television Company; *Edward S. O'Neil* and *David G. Frolio* on behalf of West Valley City Television Associates, Limited Partnership; and *Arthur I. Steinberg* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: May 10, 1985 Released; May 20, 1985

1. On January 31, 1984, the Commission, by the Chief, Mass Media Bureau designated for hearing these mutually exclusive applications for VHF television Channel 13 at Salt Lake City, Utah and West Valley City, Utah. 49 Fed. Reg. 5667 (1984).[1] The following issues remain to be resolved in this initial decision:

1. To determine with respect to Intermountain Broadcasting, Joseph C. Lee, George L. Gonzales, et al., General Partners, d/b/a Mountain West Television Company, and West Valley City Television Associates, whether circumstances exist to warrant a waiver of § 73.685, 47 C.F.R. § 73.685.
2. To determine, with respect to Joseph C. Lee, George L. Gonzales, et al., General Partners, d/b/a Mountain West Television Company, whether the applicant has demonstrated good cause for locating its main studio outside its community of license.
3. To determine the circumstances under which Intermountain Broadcasting, Inc. failed to amend its application, pursuant to Sections 1.65 and 73.3514, to reflect the November 8, 1982 promise of David R. Williams and Deanna M. Williams to work full time at the proposed Utah Telecourier, Inc. cellular mobile radio system in Salt Lake City. And to determine in light of those facts, whether its conduct was negligent or inattentive to Commission reporting rules or lacking in candor and in effect of any such failure on the basic and/or comparative qualifications of the applicant.
4. To determine which of the proposals would, on a comparative basis, best serve the public interest.
5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.[2]

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[1] Salt Lake City Utah T.V., Inc. also filed an application but it was dismissed with prejudice on September 20, 1984. *Memorandum Opinion and Order*, FCC 84M-4036, released September 21, 1984.

[2] Issues 1(a) and (b), 3(a) and (b), 4(a), and 6 in the *Memorandum Opinion and Order* designating these applications for hearing were previously resolved as follows: Financial issues (1(a) and (b) and 3(a) and (b)) designated against Utah

2. A prehearing conference was held on April 26, 1984, oral cross-examination was held on August 21–24, and 27, 1984 and January 7, 1985. Proposed findings of fact and conclusions of law were filed by all applicants and the Mass Media Bureau on October 31, 1984 and replies were filed on November 23, 1984 by all applicants, except West Valley City Television Associates, which filed a reply on November 21, 1984, and Mountain West Television Company, which filed a reply on November 26, 1984. Supplemental proposed findings were filed on issue 3 on February 1, 1985 by all the applicants except West Valley City Television Associates. Supplemental replies were filed on February 8, 1985 by Utah Television Associates, Intermountain Broadcasting, Inc., Salt Lake City Family Television, Inc., and Mountain West Television Company. The record was closed on January 7, 1985. *Order*, FCC 85M-073, released January 8, 1985.[3]

FINDINGS OF FACT

I. Circumstances governing waiver of § 73.685.

(a) Intermountain

3. Intermountain proposes use of a directional antenna which will have a ratio of maximum to minimum radiation of 14 dB, which exceeds the 10 dB limit presently imposed by § 73.685(e). Intermountain Exh. 5A at 2–3. Intermountain's proposed directional antenna was selected in order to protect the allocation of Channel 13 at McGill, Nevada and Twin Falls, Idaho, to provide

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Television Associates and Mountain West Television Company were resolved in a summary decision. *Memorandum Opinion and Order*, FCC 84M-1689, released April 6, 1984; *Memorandum Opinion and Order*, FCC 84M-2937, released June 29, 1984. The hazard to air navigation issue (issue 4(a)) designated against West Valley City Television Associates, Limited Partnership was also resolved in a summary decision. *Memorandum Opinion and Order*, FCC 84M-1689, released April 6, 1984. The parties stipulated that issue 6, the § 307(b) issue, would not be decisionally significant and therefore, no evidence was taken on that issue. Tr. 536-7. In addition, Utah Television Associates, Limited Partnership was directed to demonstrate that its proposal would provide equivalent protection according to the method specified in the *VHF TV 100 Markets*, 81 F.C.C. 2d 233 (1980) to reference points in Twin Falls, Idaho and McGill, Nevada (designation order at ¶ 26) and to provide certification of publication of local notice (designation order at ¶ 36); these filings were made by Utah Television Associates on March 1, 1984.

[3] A Motion to Reopen the Record and to Enlarge Issues against Salt Lake City Family Television, Inc. was filed March 29, 1985 by Mountain West Television Company. That request is considered with the Conclusions of Law in this decision, and is denied for the reasons given there.

coverage to Salt Lake City which would exceed the minimum 77 dBu requirement, to insure maximum facility coverage to the suburban areas south of Salt Lake City, and to obtain the best overall coverage. *Id.* at 2; Tr. 1008.

4. However, radiation cannot be limited to 10 dB if maximum permitted power of 316 kw (25 dBk) is employed. Intermountain Exh. 5 at 2. Whle Intermountain's antenna radiation will exceed 10 dB, the antenna site is on a mountain peak with no natural or man made sources of reflection nearby. *Id.* at 5. Intermountain believes that the proposed transmitter would operate with precise frequency control to eliminate directional pattern variations due to random frequency deviation. *Id.*

5. Intermountain also states that its proposed antenna performed satisfactorily elsewhere and that its proposed circular polarization would assist in eliminating possible reception difficulties caused by reflections. *Id.* It believes that the additional radiation may be enough in some instances to raise a marginal picture up to a good pricture. Tr. 1022. But Intermountain has not identified in what areas this would occur. Tr. 1023. It did not study the area and population coverage differences between 10 dB and the proposed 14.9 dB. Tr. 1017–1018.

(b) Mountain West Television Company.

6. Mountain West Television Company would employ a horizontally polarized antenna with excess antenna suppression .6 dB over that allowed. Mountain West Exh. 7 at 2. The proposed site, because it is well above the surrounding terrain, is free of reflections from higher terrain or buildings. *Id.* The horizontally polarized antenna was selected because the manufacturer believes it will maintain the necessary suppression. *Id.* Mountain West's proposal includes Grade B coverage of Brigham City, Utah (not covered by Family) on the north and Grade A coverage of Springville, Spanish Fork and Payson to the south. Neither Family nor Utah Television Associates provides Grade A service to these areas. Mountain West Exh. 7 at 5; UTA Application Exh. 18; Family Application Exh. E–6.[4]

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[4] Family urges that these facts, which are derived from comparing a map in its engineering application with Mountain West's Exhibit 7, should not be considered because they are based on a part of Family's application that is not part of the hearing record and that was not subjected to cross-examination. Family does not, however, dispute the facts asserted, nor does it demonstrate that the map from its application is unreliable, or that the map is not an objective source of information that is appropriate for official notice. Furthermore, it does not claim that any of the maps relied on differ in any material

(c) West Valley City Television Associates.

7. West Valley City Television Associates (West Valley TV) proposes an antenna with a ratio of 22.5 dB which will be located on an existing tower on Nelson Peak. West Valley Exh. 9 at 3, 5. The surrounding site is free of large buildings or large natural obstructions that might cause reflections into the antenna pattern null. *Id.* The area in the null between the Grade A and B contours is sparsely populated (1.25 people per square mile) with only 1,646 people. *Id.* at 7. West Valley TV has proposed to employ precise frequency offset. This, it believes, will ensure that the trasmitter is sufficiently stable so that the antenna will act as designed. *Id.* West Valley TV concedes that with less than the maximum power it proposes, it could comply with § 73.685. Tr. 1040.

II. Mountain West's studio location outside Salt Lake City.

8. Mountain West proposes to locate its main studio in West Valley City, just outside the political boundaries of Salt Lake City, on 2300 South Street. Mountain West Exh. 8 at 1. Mountain West has represented that it would locate its studio no more than one mile from the corporate limits of Salt Lake city. *Id.*

9. The proposed location is in the approximate center of the Salt Lake Valley and would be accessible to the public within the entire proposed service area. *Id.* The studio location is a 15 minute drive from downtown Salt Lake City and is more convenient to residents of large portions of Salt Lake City, via I-80 and the 21st South Freeway, than a downtown location would be. *Id.* at 2.

10. Rental rates for commercial space along the 21st South Freeway corridor in West Valley City are about half the prevailing rates downtown. Mountain West claims that the proposed location will allow it to have much larger studio facilities, thereby assisting the station's production efforts. *Id.* Mountain West also intends to establish at least a sales office, if not an actual auxiliary studio, in downtown Salt Lake City. *Id.*

11. The proposed main studio in West Valley City will reduce the distance from studio to transmitter as compared with a Salt Lake City location. *Id.* at 3. This will, Mountain West claims, minimize both signal degradation and the risk of losing a line of

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respect about the applicants' coverage areas. In the context of the waiver of § 73.685 issue, the information asserted by Mountain West is reliable and will be considered.

sight path due to construction of tall buildings between the studio and the Nelson Peak transmitter site.

12. The Commission has authorized a main studio site in West Valley City for television station KUTV, Channel 2. KUTV is licensed to Salt Lake City. *Id.* at 2–3.

III. Comparative considerations.

(a) Utah Television Associates Limited Partnership.

13. *Integration of Ownership and Management.* UTA is a limited partnership formed under the laws of Utah. UTA Exh. 1 at 1. UTA claims two general partners and three limited partners. Both general partners purport to have "full and complete responsibility over the management of the partnership business" and have "the authority to bind the partnership in all decisions made for and on behalf of the partnership." *Id.* UTA identified its partners, their partnership status, and their equity interest as follows:

Name	*Partnership Status*	*Equity Interest*
G. Andrew Lawrence	General	10.00%
Utah Television Enterprises Corporation ("UTEC")	General	20.00%[5]
Richard S. Knight	Limited	35.00%
Arnold Orleans	Limited	26.25%
J. U. Investment Associates	Limited	8.75%

Id.

14. UTEC is a Utah corporation which will function as managing general partner of UTA. UTA Exh. 1 at 1, 2; Tr. 51. In that capacity, UTEC will "run the station." Tr. 51–52. Pursuant to an agreement among UTEC's shareholders, G. Andrews Lawrence will act as General Manager of UTEC. Tr. 53. Mr. Lawrence initially testified that UTEC will hire and fire employees and make programming decisions. Tr. 52. Later, however, Mr. Lawrence testified that in his role as general manager of the station, he and not UTEC would have ultimate authority to make programming and hiring and firing decisions. Tr. 59–60.

15. UTEC has four shareholders;[6]

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[5] UTEC's interest in the operating profits of the corporation is much less than 20%.

[6] As of the B cut-off date, Larry D. Benes was a 0.1% stockholder of UTEC. Tr. 24. Mr. Benes owns 100% of BenDel Broadcasting Corp., the permittee of a new FM station in Muncie, Indiana.

Name	*Interest*
Dennis Valenzuela	49%
G. Andrew Lawrence	17%
Richard S. McKnight	17%
Arnold Orleans	17%

UTA Exh. 1 at 2.

16. UTA proposes to integrate G. Andrew Lawrence (whose total effective interest in UTA is deemed to be 44.66%), Dennis Valenzuela (32.66%), and Richard S. McKnight (11.33%) into the management of the station. UTA Exh. 2 at 1.

17. UTA's original application states that:

> pursuant to Utah law, limited partners lose protection of limited liability by participating as a limited partner in management of the business of the Limited Partnership. This responsibility is expressly reserved to the general partners: In this case, G. Andrew Lawrence and [UTEC].

"UTA-13's Business Plan," Exhibit 3 to UTA Application at 2-3; Tr. 81-82. Additionally, UTA's partnership agreement forbids its limited partners from exercising any rights in connection with the management of the partnership business in their capacity as limited partners. Family Exh. 5 at 9.

18. Dennis Valenzuela is an Hispanic American and 28-year resident of the Salt Lake City area. UTA Exh. 3 at 2. He presently resides in Sandy, Utah. *Id.* at 3. Sandy is not adjacent to Salt Lake City. Tr. 126. He has lived in Salt Lake City for only four years ending in 1961. Tr. 143-44. Mr. Valenzuela is currently employed as an engineering specialist with Mountain Bell Telephone Company in Salt Lake City, Utah. UTA Exh. 3 at 3. Mr. Valenzuela's written biographical statement indicates that "[f]or the past 4 years he has held the position of Voting District Director in Salt Lake City Voting District No. 488." *Id.* at 2. Mr. Valenzuela testified that his four years of service as the Voting District Director, in fact, ended more than a decade ago. Tr. 117. For the most part, Mr. Valenzuela's religious and civic positions fall in the distant past. Mr. Valenzuela discontinued his position as an Elder's Quorum President in 1959 or 1960; stopped working as a special missionary fifteen years ago; and was last a youth leader for his church in 1957. *Id.* at 2-3; Tr. 119-20. Similarly, his commendation for youth leadership and receipt of an achievement

award from his church occurred between 1958 and 1960. Tr. 120.

19. Mr. Valenzuela proposes to work full time as Director of News and Public Affairs. *Id.* at 1. Mr. Lawrence testified that Mr. Valenzuela was brought in as an integrated stockholder for "his technical capability in the communications industry." Tr. 40. However, Mr. Valenzuela has no experience in "the technical area" of broadcast communications. Tr. 106. In any event, Mr. Valenzuela will not serve in a technical position at the proposed station. Tr. 79. Contradicting Mr. Lawrence, Mr. McKnight admitted that Mr. Valenzuela was brought in to bolster the UTA application with the presence of a minority owner. Tr. 171-72. Mr. Valenzuela has no broadcast experience. Tr. 120.

20. When asked what position he held in UTEC, Mr. Valenzuela incorrectly testified that he was its Vice-President and Secretary. Tr. 101. When Mr. Valenzuela was asked who UTEC's Treasurer was, he had to refer to the UTA application -- where he learned that the Treasurer was himself. Tr. 134. However, as Secretary/Treasurer he has never kept the books and records of the corporation and is unaware of the existence of a corporation bank account. Tr. 136. In fact, only Mr. Lawrence, not Mr. Valenzuela, has the authority to sign corporate checks. Tr. 190.

21. Mr. Valenzuela has invested $490 in UTEC with no further obligation to increase that amount. Tr. 104. He was approached by Mr. Lawrence to participate in UTA. Tr. 97. Mr. Valenzuela's brother-in-law, Gordon Jones, is a good friend of Mr. Lawrence and he referred Mr. Lawrence to him. He was told later that he would be paid $45,000 per year. Tr. 115. He presently earns a salary of $30,000 per year. Assuming that UTEC has 20% of the equity in UTA, Mr. Valenzuela's 49% interest in UTEC is equivalent to a 9.8% equity interest in UTA. Accordingly, he has paid only $50 for each 1% of equity he holds in the applicant. In contrast, Mr. McKnight testified that he paid at least $40,000 for his 35% limited partnership interest in UTA and his 17% shareholder interest in UTEC. Tr. 179. He testified that the money was divided between the two interests in proportion to the extent to which each interest contributes to his total equity in the partnership. Tr. 179. Since his interest in UTEC is nominally equivalent to 3.4% of the overall equity in UTA, Mr. McKnight's total interest in UTA would be 38.4%. Thus, he has paid over $1,041 for each percentage share of the company: more than

twenty times the proportionate price paid by Mr. Valenzuela.

22. In UTA's B cut-off amendment, Mr. Valenzuela was proposed as the Program Director and Director of Public Affairs of the station, but in UTA's direct case his proposed position is that of Director of News and Public Affairs. Tr. 105, 109-11. However, Mr. Valenzuela knows nothing of the processes of gathering and editing information for a news department. Tr. 124. It was determined sometime after August 6, 1981 (the B cut-off date), that Mr. Valenzuela would be News Director rather than Program Director. Tr. 111. Mr. Valenzuela was unaware that he had ever been proposed as Program Director, remembering only the possible news and public affairs position. Tr. 113. The change in position was made without anyone discussing it with Mr. Valenzuela. Later, he was asked to go along with the decision. Tr. 112-13.

23. Mr. Valenzuela receives "things in the mail telling [him] what had already been decided . . . by the other shareholders." Tr. 128. For example, Mr. Valenzuela is not a director of UTEC and was not consulted in the selection of the directors of UTEC. Tr. 180, 182. Similarly, Mr. Valenzuela did not know "what it means to vote [his] stock." Tr. 126.

24. Mr. McKnight first met Mr. Valenzuela a week before the hearing in late August, first spoke with him over the phone less than a month before that, and has never had any written correspondence with him. Tr. 178. Moreover, Mr. McKnight believed that Mr. Valenzuela was not even a director of UTEC. Tr. 180-81. Mr. Valenzuela testified that Mr. Lawrence has the final decision-making authority over all matters. Tr. 107.

25. Mr. Valenzuela is, according to his own testimony, "more concerned with retiring from the phone company . . . working for the TV station with a nice salary . . . and [doing] something to supplement [his] retirement income" than in his percentage of ownership or his share of profits of the company. Tr. 140. His chief interest is the fact that he will have an interesting job, not in having an ownership interest in the company. Tr. 141.

26. Richard S. McKnight is President of McKnight Oil Company and a 32-year resident of the Salt Lake City area. UTA Exh. 4 at 1. Mr. McKnight, however, lived in Salt Lake City for only five years ending in 1957. Tr. 208. He presently resides in Holladay, Utah. Tr. 205-08. Mr. McKnight's record of community involvement is limited to having served on the Board of Trustees and as Chairman of the Fund Raising Development Committee and Nominating Committee for the Kimball Art Center in Park

City, Utah from 1980 to 1983. UTA Exh. 4 at 1–2.

27. Mr. McKnight has pledged to work full time as Business Manager. *Id.* at 1. As such, he will be participating in the decision making process of "day-to-day and long-term cost control and management of the station," as well as development of the overall station budget in conjunction with the General Manager. *Id.*

28. According to Mr. Lawrence, Mr. McKnight holds "general partnership interests" because "[he] wanted to have a continuing interest rather than strictly a limited interest." Tr. 38–39. Mr. McKnight first proposed to work at the station in early 1984, well after the B cut-off date. Tr. 80.

29. Mr. McKnight participated in the application because he had been asked by Mr. Lawrence to do so. Tr. 163. He had known Mr. Lawrence from his work as a political consultant to a candidate for the U. S. Senate from Utah. *Id.* From the outset of UTA's proposal, Mr. McKnight knew that he would have a sizeable interest as a participant in the proposal because he was providing a good deal of the money. Tr. 165. It was not his decision to become a limited partner; that decision was made by his counsel and Mr. Lawrence. Tr. 166–67, 212, 213. There was no legal structure planned at the time he was contacted by Mr. Lawrence; those plans came later and were not at his suggestion. Tr. 165. In fact, he did not know why he had been designated a limited partner since he always intended to be an active participant. Tr. 165, 212, 213. In his view, he could not have promised to participate when the B cut-off amendment was filed because he was busy. Tr. 185.

30. G. Andrew Lawrence is President of the Lawrence Company, a consulting firm located in Alexandria, Virginia. Tr. 31–32. He has been associated with the firm since 1977. Tr. 32. Mr. Lawrence is a general partner of UTA both individually and indirectly through his role as the prime mover behind UTEC, the other general partner. Tr. 37–38.

31. Mr. Lawrence has promised to work full time as General Manager of the proposed station. UTA Exh. 5 at 1. He would also function as Executive General Manager. Tr. 44.

32. Mr. Lawrence holds (jointly with his wife) a 10% interest in Tri-City Broadcasting, Inc., which pursued an application for a new FM station in Craig, Colorado during 1978. Tr. 33–34. As part of that application, he pledged to work in managing the station and to relocate to Craig if Tri-City's application were granted. Tr. 34–35. The Tri-City Broadcasting application was granted pursuant to a settlement agreement, but Mr. Lawrence

never moved to Craig. Tr. 35, 64–65. Mr. Lawrence testified that he did not move to Craig and work at the station because circumstances changed. *Id.* However, Mr. Lawrence admitted that the Craig settlement was the only change in circumstances which had occurred. He has similarly committed, in conjunction with the present application, to relocate to the Salt Lake City area. UTA Exh. 5 at 1.

33. *Diversification.* Mr. and Ms. Andrew G. Lawrence hold a 10% interest in Tri-City Broadcasting, Inc., licensee of KQZR–FM in Craig, Colorado. UTA Exh. 6 at 1. Mr. Lawrence is a Director and Vice President of the corporation. Tr. 86. He also holds a 0.25% interest in Channel 38 Associates, licensee of Channel 38 (WNOL–TV) in New Orleans, Louisiana. UTA Exh. 6 at 1.

34. The controlling principal of J. U. Investment Associates, Robert S. Understein, holds the following broadcast interests:

> 0.1% limited partnership interest in Bison City 49 Limited Partnership, licensee of Channel 49, Buffalo, New York;
>
> 1.45% limited partnership interest in the licensee of KWFM(FM) and KCEE(AM) Tucson, Arizona;
>
> 2.5% limited partnership interest in KISS Limited Partnership, licensee of WXKS and WXKS–FM, Medford, Massachusetts;
>
> 6.6% limited partnership interest in Holt Limited Partnership, licensee of WHPL(AM) and WEFG(FM), Winchester, Virginia;
>
> 5.1% limited partnership interest in KEZQ Limited Partnership, licensee of KEZQ(FM) and KBOX(AM), Jacksonville, Arkansas. *Id.* at 1–2.

35. As of the B cut-off date in this proceeding, and until the fall of 1983, Larry D. Benes held a .5% interest in UTEC, UTA's general partner, and 20% owner. UTA Exh. 8 at 1. Mr. Benes is the 100% owner of BenDel Broadcasting Corporation, an applicant to construct a new FM radio station to serve Muncie, Indiana. *Id.* The application was granted in an initial decision but still is pending. *Id.* at 1–2. As of the B cut-off date in this proceeding, Mr. Benes also held a 1% limited partnership interest in Med-12 Limited Partnership, an applicant for a construction permit for a new television station in Medford, Oregon. *Id.* at 2. Med-12 entered into a settlement agreement with other parties to that proceeding which was approved on September 2, 1982. *Id.* The Commission's records indicate that Med–12 was then and is now a 20% shareholder of Sunshine Television, Inc., which holds the Channel 12 construction permit. Subsequent to the Commis

sion's award of this construction permit, Mr. Benes divested his interest in Med-12. *Id.*

36. Dennis Valenzuela, Richard McKnight and Arnold Orleans do not hold any attributable interest in any broadcast property or in any other medium of mass communications. *Id.* at 1.

(b) Intermountain Broadcasting, Inc.

37. *Integration of Ownership and Management.* Intermountain is a Utah corporation with the following officers and directors:

Name	*Corporate Office*	*Percentage of Voting Stock*
David R. Williams	President/Director	55%
Deanna M. Williams	Secretary/Treasurer/Director	45%
Ricky Dean Barlow	Vice President	None
Randy Nestman	Vice President	None

Intermountian Exh. 1 at 1.

38. David R. Williams and his wife, Deanna M. Williams, own all the voting stock in Intermountain. *Id.* Mr. Williams claims that he will act as the full-time General Manager for Channel 13, while Ms. Williams proposes to work full-time as Business Manager/Personnel Manager if Intermountain's application is granted. Intermountain Exh. 1 at 1, 2.

39. Although Ms. Williams is the nominal holder of 45% of Intermountain's voting stock, she has not been present at any of the settlement negotiations in this proceeding and acknowledged that her husband's 55% voting interest can legally cut her out of every decision made by Intermountain. Tr. 234, 239-40. Although Ms. Williams did discuss with her husband some aspects of the projected finances for the television proposal, her specific contribution amounted to providing estimates for Social Security and insurance costs. Tr. 244. Mr. Williams testified that he had rejected his attorney's suggestion of an equal division of voting interest because he wanted there to be "no doubt" that he was in control of the corporation. Tr. 259-60. Similarly, Mr. Williams subsequently proposed that his wife work full time at a proposed cellular radio operation without her having ever seen a draft of the proposal and without even discussing the matter with her. Tr. 321-22. Mr. Williams testified that he "most definitely" felt comfortable in making such a commitment for Ms. Williams without discussing it with her. Tr. 322.

40. Rickey Barlow is represented in the Intermountain direct case as a Director of Intermountain, but Ms. Williams stated that he did not have such a position. Intermountain Exh. 1 at 1; Tr.

229. When Ms. Williams was shown information indicating Mr. Barlow's role, she testified that it was the first she had heard of such a position. Tr. 231.

41. Mr. and Ms. Williams have resided in the Salt Lake City area since 1966. During 1966 and 1967, and from June 1970 to February 1971, they resided within the Salt Lake City limits. Intermountain Exh. 2 at 1, Exh. 3 at 1. They currently reside in Bountiful, Utah. They have committed to move to Salt Lake City if Intermountain's application for Channel 13 is granted. *Id.*

42. Mr. and Ms. Williams have operated radio station KFAM(AM), since late September 1981. Intermountain Exh. 2 at 2; Exh. 3 at 2; Tr. 286. The station when it began operation was licensed to Bountiful, Utah but in December 1983 the city of license was changed to North Salt Lake City, Utah. Tr. 300. (The station did not go on the air until about six weeks after the August 6, 1981 B cut-off date for Channel 13). The station is licensed to General Broadcasting, Inc., which is 55% owned by Mr. Williams and 45% by Ms. Williams. Intermountain Exh. 1 at 3. Mr. Williams is the KFAM General Manager and Ms. Williams is the Business/Personnel Manager. Intermountain Exh. 2 at 2; Exh. 3 at 2. Ms. Williams claims that she acts as the station's General Manager when Mr. Williams is away. Tr. 249. But as a practical matter, she stated that the radio station functions performed by Mr. Williams are performed by Rickey Dean Barlow, Mr. William's assistant. Tr. 232. Ms. Williams works mostly at home. Tr. 237. Mr. Barlow will perform a similar function at the television station. Tr. 232. Mr. and Ms. Williams have promised to terminate all connection with KFAM if awarded the construction permit. Intermountain Exh. 1 at 3; Exh. 2 at 2.

43. Mr. and Ms. Williams claim minority status as Cherokee Indians. Intermountain Exh. 2 at 3; Exh. 3 at 2. However, neither Mr. Williams nor Ms. Williams is a member of the Cherokee Indian Nation, is listed on any books or rolls of the Cherokee Indian Nation, attends Cherokee meetings, or votes in Cherokee affairs. Tr. 223-24, 266-67. Ms. Williams has never been issued a CDIB (Certificate of Degree of Indian Blood). Tr. 241. In addition, neither of the Williams claimed minority status as American Indians on KFAM's Annual Employment Report, although Mr. Williams personally signed such forms. Tr. 266, 287. In an effort to avoid the conclusion that the Williams had conceded to the FCC that they were white, not Indian, Mr. Williams testified under oath that he did not include himself and his wife on KFAM's employment report forms because they are not "paid

employees" of General Broadcasting. Tr. 290. However, Ms. Williams contradicted this assertion, testifying that she is paid for her work and was classified as an official and manager in the annual employment reports, but did not claim minority status. Tr. 222-23.

44. Mr. and Ms. Williams have the same ownership interests in Utah Telecourier, Inc. (which has applied for a cellular radio construction permit in the Salt Lake City market) as in Intermountain. Tr. 226-27. The application is still pending. Tr. 227. Both Mr. and Ms. Williams have committed, in the Utah Telecourier application, to work full time should the application be granted. Tr. 228. This application was filed after they had committed to full-time participation in Channel 13. Tr. 229. The cellular application does not provide that their full-time commitments are contingent on Intermountain's failure to obtain the Channel 13 permit. Tr. 302-03. In addition, the cellular application does not disclose Mr. Williams' full-time commitment at Channel 13, although Mr. Williams was very much aware of that commitment at the time he was preparing the cellular application. Tr. 304, 311. Rather, Mr. Williams testified that "in the event that I was successful with the TV application that . . . I could have the cellular [application] dismissed or, in the event that I lost the television [application], that then I could go ahead with the cellular application." Tr. 298.

45. According to Mr. Williams, his attorney informed him that he could make a full-time commitment in both the cellular proceeding and the current Channel 13 proceeding. Tr. 301. Mr. Williams knew, however, that the attorney had no expertise in broadcast matters.

46. *Compliance with § 1.65 by Intermountain Broadcasting.* On March 10, 1981, Intermountain filed an application for the construction permit at contest in this proceeding. Intermountain has two shareholders: David Williams, who owns 55% of the stock and his wife, Deanna, who owns the remainder. J.S. (December 3, 1984 Joint Stipulation) at 1-2. The Intermountain television application contains the following representation:

> Mr. David R. Williams will serve as General Manager on a full-time basis . . . . Mrs. Deanna M. Williams will serve as Business/Personnel Manager on a full-time basis. J. S. Exh 1.

47. Both Mr. and Ms. Williams testified that the above commitments were unequivocal commitments. They testified that the commitments were true when made and true throughout the

entire period the television application was pending. Tr. 226, 260.

48. On November 8, 1982, Utah Telecourier, Inc., ("UTI") filed with the Commission an application for authority to construct a cellular mobile radio system to serve the Salt Lake City/Ogden Utah, MSA. David Williams owns 55% of the stock of UTI, and Deanna M. Williams owns the remaining 45%. J. S. at 2. The UTI application contains the following commitment:

> David R. Williams is President Director and 55% shareholder of Utah Telecourier, Inc. . . . He will serve as full-time General Manager of UTI, in conjunction with his other radio common carrier responsibilities, overseeing the station's five operating departments. . . .
>
> The Financial Department will be headed by Deanna M. Williams (Secretary-Treasurer, Director, 45% shareholder), the wife of David R. Williams, who will serve fulltime as Comptroller. . . . Family Exh. 6.

49. Mr. Williams and Mr. Barlow, Mr. Williams' assistant, flew to Washington to review the final draft of the cellular application prior to its being filed. Tr. 300, 321. Mr. Williams had been primarily responsible for the preparation of the application. Ms. Williams had not been substantially involved. Tr. 321–22, 1101. She was not consulted about her cellular integration commitment. Tr. 321–22. The information contained in the cellular employment commitment came from Mr. Williams in answer to a questionnaire sent by the attorneys representing him as a cellular applicant. Tr. 1116, 1117–18.

50. When asked at the hearing to explain the conflicting cellular and television integration proposals, Mr. Williams testified that he had specifically asked his cellular counsel, Harold Mordkofsky, about the full-time cellular commitment in connection with his television integration pledge. Mr. Williams stated that he had informed his cellular attorney of his previous promise to work full time at the television station a full month before the application was filed. Tr. 327. Mr. Williams stated that he was told by Mr. Mordkofsky that there was no problem with representing in both applications that he would work full time, because there were numerous cellular applications expected and thus a cellular commitment would not be evaluated until after the television case had been decided. Tr. 298, 301, 303. By contrast, Mr. Mordkofsky testified that he never knew of Mr. Williams' full time commitment in the television proceeding, and thus never specifically advised Mr. Williams as to the conflicting commitments. Tr. 1102–03. The only question asked by Mr. Williams of Mr. Mordkofsy was whether the television application had to be

reported in the cellular application.[7] This question was only asked two days before the cellular filing. Intermountain Exh. 10 at 2.

51. Mr. Williams also testified that he believed his chances of succeeding in the cellular application were slight. This was because of the number of applications which would likely be filed. Tr. 325. Mr. Mordkofsky, on the other hand, testified that Mr. Williams was reluctant to settle even after the Commission made the decision to implement a cellular lottery, in hopes that the decision would be overturned and comparative hearings reinstated. This was due to the fact that Mr. Williams believed he had the best application and would win any comparative proceeding. Tr. 1121–22.

52. Mr. Williams also testified that he and his cellular attorney did not believe his cellular commitment would have any comparative significance. Tr. 326.[8] Yet, at the time of the filing of the UTI application, no cellular cases had been decided. The comparative criteria had not been clearly interpreted by case law precedents. Tr. 1102. According to Mr. Mordkofsky, the Williams' full-time commitments were included in the UTI application not only in an effort to be responsive to the cellular application form, but also because it was believed that the commitments could prove to be of comparative significance. Tr. 1105. Mr. Williams' cellular counsel had previously tried a mobile radio case in which a full-time employment commitment by an owner had been decisionally significant. Tr. 1108. In addition, very soon after the UTI application filing, Mr. Mordkofsky's firm argued, in a first-round cellular proceeding pertaining to the Chicago market, that its client should be given a preference because its principals could devote more day-to-day time to their proposed operation than could a competitor. Tr. 1109.

53. Mr. Williams never advised his broadcast attorneys of the integration commitment made in the cellular application. Tr. 308. The Intermountain application was amended on November 30, 1982 to report the filing of the UTI application. J. S. at 2. However, that amendment makes no reference to the integration commitments of Mr. and Ms. Williams which were contained in the UTI application. J. S. Exh. 2. Nor have there been any subsequent amendments to the Intermountain application which

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[7] The UTI cellular application contains no reference to the Intermountain television application. J. S. at 3.

[8] There had been no proposal for a cellular lottery when the UTI application was filed. The Notice of Proposed Rulemaking for a cellular lottery was releaed November 11, 1983. The lottery was not adopted until April 1984. Tr. 1111–12.

refer to the UTI application. J. S. at 2-3.

54. Moreover, on May 10, 1984, Intermountain filed an "Integration Proposal and Diversification Statement" in this proceeding pursuant to order of the Presiding Judge. This statement reiterates the Williams' full-time commitment, and makes no reference to the UTI application or integration commitment. The only reference to Williams' common carrier interests was a note, contained at page 3 of the statement, indicating that these interests existed but were insignificant for diversification purposes. Family Exh. 9.

55. Mr. Williams testified that, at the time the integration statement was filed, he considered his cellular application dead.[9] Specifically, he said that he was involved in heavy settlement discussions concerning the cellular application after the lottery was adopted. In these discussions, he was attempting to decide which of the two settlement alliances UTI would join. Tr. 299. Mr. Mordkofsky, however, testified that Mr. Williams was not interested in a cellular settlement until after the lottery order was released in April 1984. He indicated that Mr. Williams delayed in joining the "Grand Alliance" settlement group because, as noted above, he was opposed to the lottery concept and hoped that the lottery order would be overturned. Mr. Mordkofsky said that Mr. Williams felt that he had the best cellular application and, had it gone to hearing, he would have won. Tr. 1121-22. The Grand Alliance filed a settlement proposal with the Commission on July 2, 1984. However, UTI did not join the Grand Alliance until the end of July. Tr. 1113.[10]

56. The hearing Exhibits of Intermountain were submitted on August 7, 1984. These contain no reference to his integration promise in the UTI application. It only states that common carrier interests are not attributable for diversification purposes. Intermountain Exh. 1 at 3.

57. Mr. Williams testfied that he always viewed the television commitment as supreme because, if granted, he intended to divest himself of all his common carrier interests. Tr. 297. Earlier, however, he had indicated only that it was his "feeling that most likely" he would sell his common carrier interests if the television

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[9] By contrast, when testifying as to when settlement negotiations occurred prior to being confronted with his inconsistent cellular promise, Mr. Williams testified that the cellular settlement negotiations had occurred within three months of the television hearing held on August 21, 1984. Tr. 261.

[10] The settlement in the Salt Lake City cellular proceeding has since been undone, due at least partially to UTI's filing of an antitrust action against the other applicants for the Salt Lake City construction permit. Tr. 1114-15.

station was granted. Tr. 268. At one point Mr. Williams testified that he informed cellular counsel of these plans prior to the filing of the cellular application. Tr. 304. At another point he stated that the intent was formed after the filing of the cellular application. Tr. 328. Mr. Mordkofsky stated that Mr. Williams had only informed him that the long-term economic prospects of the radio common carrier industry were not good and that he was "considering" leaving the industry to focus on broadcasting. Intermountain Exh. 10 at 2.

58. Mr. Williams has been in the radio common carrier industry for about 25 years. Tr. 295. He has worked with common carrier counsel for over 15 years. Tr. 309. He has signed and filed applications for new facilities during these years. Tr. 295. He has also filed an application for an AM station in the past. Tr. 294. He recognizes that, by signing an application, he was representing that the matters contained therein were true and correct. Tr. 296.

59. *Diversification.* David R. Williams is President, Director and 55% stockholder in General Broadcasting, Inc., licensee of Station KFAM(FM), Bountiful, Utah. Intermountain Exh. 1 at 3. Deanna M. Williams is Secretary/Treasurer, Director and 45% stockholder in General Broadcasting, Inc. General Broadcasting has filed applications for multi-channel multiple distribution systems to serve both Salt Lake City and Provo, Utah. Tr. 837–38.

60. Mr. and Ms. Williams have promised to divest themselves of their interests in KFAM should the Intermountain application be granted. Intermountain Exh. 1 at 3. Mr. Williams has not committed to divest himself of his common carrier interests. Tr. 328.

(c) Salt Lake City Family Television, Inc.

61. Salt Lake City Family Television, Inc. is incorporated under the laws of the State of Tennessee. Family Exh. 1 at 1. On the B cut-off date, the corporation was organized as follows:

Name	*Shares of Stock*	*Office*
Patrick David Crants	51%	President
Revecca Nell Bain (now Hewgley)	47%	Vice-President
Erma L. Freeman	1%	Secretary
Jack H. Dalton	1%	Treasurer

Id.

62. Rebecca Hewgley and Patrick Crants originally decided that they would split the ownership of Family 49-51%. Tr. 343. However, when Erma Freeman agreed to join them Ms. Hewgley gave up 2% of her interest to Ms. Freeman. *Id.* Then following the filing of the application Ms. Hewgley asked her uncle Jack Dalton, to participate and he recieved half of Ms. Freeman's 2% share. Tr. 343-44. In addition to his relationship with Ms. Hewgley, Mr. Dalton had existing relationships with Ms. Freeman and Mr. Crants. Ms. Freeman was, at the time the application was made, employed by Media South, a company owned by Mr. Dalton (Tr. 333, 335) and Mr. Crants is the brother of a business associate of Mr. Dalton. Neither Mr. Dalton nor Ms. Freeman are currently stockholders; they have not been stockholders since November 10, 1982. Family Exh. 1 at 1.

63. Although Mr. Dalton did not initially participate as an owner and officer of Family, he was important in its formation. It was Mr. Dalton that Ms. Hewgley first told about her interest in applying for a television station and it was Mr. Dalton who suggested Channel 13 in Salt Lake City. Tr. 334. From the outset, Ms. Hewgley wanted Mr. Dalton to join with her in the application but he initially refused. *Id.* Instead, Mr. Dalton suggested Patrick Crants and acting on that suggestion, Ms. Hewgley contacted him. *Id.* Mr. Crants and Ms. Hewgley together asked Ms. Freeman to join them. Tr. 334-35. But again it was Mr. Dalton who originally suggested that Ms. Freeman would be a good person to join them because she had had experience preparing an application for a broadcast license. Tr. 337-38. It was also Mr. Dalton who suggested the consulting firm of Sterling Communications. Tr. 335, 376.

64. The application was actually prepared by Ms. Freeman and Sterling Communications and amendments were prepared by the applicant's law firm. But Mr. Crants and Ms. Hewgley approved of what was being done. Tr. 386, 387. While Ms. Hewgley arranged for financing from the Commerce Union Bank (Tr. 342), it was Mr. Dalton's friendship with a bank officer that led her there and it was Mr. Dalton's credit with the bank that the bank relied on. Tr. 370-71. In fact, the original letter of credit was addressed to Mr. Dalton. However, after Mr. Dalton left the company, the bank issued a new loan letter which is not dependent on Mr. Dalton's credit. Tr. 372, 377.

65. Ms. Hewgley purchased only 2% of her 4% stock holding, the rest she received in exchange for preparing herself to pursue the application and pursuing it. Tr. 362-63, 364. In addition, she

is committed to guaranteeing the bank loan. Tr. 364. Mr. Crants, unlike Ms. Hewgley, has provided nothing but his guarantee for the loan from Commerce Union Bank for his stock. Tr. 389. Commerce Union Bank has provided a line of credit to pay current application expenses and interest has been paid on the money lent. Tr. 389, 417, 418.

66. Since Mr. Dalton and Ms. Freeman sold their interests, Ms. Hewgley and Mr. Crants have made all decisions and all arrangements. Tr. 344, 394. This has included firing Sterling and meeting with Washington lawyers. Tr. 377, 391.

67. Patrick David Crants is President of Salt Lake City Family Television, Inc. and owns 51% of the stock. Family Exh. 2 of 1. If the application of Family is granted, he proposes to serve full time as General Manager. *Id.*

68. Mr. Crants currently resides in Bradford, Pennsylvania. Tr. 399. He has never lived in Salt Lake City and first visited the area in January of 1983, well after the present application had been filed. Tr. 386. Mr. Crants proposes to move to Salt Lake city if Family's application is granted. Family Exh. 2 at 1.

69. Mr. Crants is a Native American, enrolled with the Seneca Nation of Indians. Family Exh. 2 of 1, Tr. 397. His membership papers were produced at the hearing. Tr. 413. He is a direct descendant of a full blooded Seneca Indian, his maternal grandmother. Tr. 410. Membership in the nation is determined by matri-lineage, if a person's mother is a member so are her children. Tr. 413. Mr. Crants is also registered as a Native American with the Bureau of Indian Affairs. Tr. 423. He identifies himself as a Native American in U. S. Census surveys. Tr. 399. His employer knows he is a Native American. Tr. 420. In the past when he has lived on the Indian reservation, he has belonged to the Allegany Indian Reservation Fire Department and the American Indian Movement. Tr. 401–02.

70. Rebecca Bain Hewgley is Vice-President, Secretary and Treasurer of Family. As of the B cut-off date, she owned 47% of the corporation's stock. Family Exh. 3 at 1. She has proposed to serve full time as Station Manager. Family Exh. 3 at 1. Ms. Hewgley has never lived in Salt Lake City (Tr. 361) but pledges to move to Salt Lake City if Family's application is grnated. Family Exh. 3 at 1.

71. While in college, Ms. Hewgley worked for three semesters as program director of her college radio station. Family Exh. 3 at 2–3. During a semester in 1974, she worked on a weekly public

affairs program broadcast by an educational television station on the college campus. *Id.* at 2.

72. In August 1976, Ms. Hewgley began work as an announcer/producer at a noncommercial FM radio station, WPLN, in Nashville, Tennessee. *Id.* In January 1981 she became chief announcer/producer. *Id.* In that capacity, Ms. Hewgley reports to the program director, who in turn reports to the general manager. Tr. 361. Ms. Hewgley also produces the morning show where she selects music and features and does on-air announcing. Family Exh. 3 at 2.

73. *Diversification.* Neither family nor any of its current stockholders has any interest in any medium of mass communication. Family Exh. 1 at 1; Exh. 2 at 2; Exh. 3 at 3.

74. On November 10, 1982, the departure of Jack H. Dalton and Erma L. Freeman from the Family application was reported to the Commission. Jack Dalton was proposed as a limited partner (33⅓% ownership) of Springfield Television Associates in an FCC Form 316 application filed on April 14, 1982, and granted on August 4, 1982. Springfield Television Associates was the permittee of KSPR, a television station in Springfield, Missouri. On August 17, 1982, he sold his interests. As of November 10, 1982, Mr. Dalton also had interests in pending applications for television stations in Riverside, California and Daytona Beach, Florida. Neither application was granted as of November 10, 1982. As of November 10, 1982, Erma Freeman held a 2% interest in and was an officer and director of High Country Broadcasting, Inc., permittee of a UHF television station at Reno, Nevada. Family Exh. 1 at 1–2.

(d) Mountain West Television Company.

75. Mountain West Television Company is a general partnership organized under the laws of the State of Utah. Mountain West Exh. 1. It has four general partners, George L. Gonzales, who has a 10% equity interest, Jo-Ann Wong, who has a 12% equity interest, Sid W. Foulger, who as a 34% equity interest and Joseph C. Lee, who has a 44% equity interest. *Id.* Mountain West claims that the voting interests of the general partners are equal, except for "certain decisions . . . such as the timing and amount of distributions from the partnership" which require approval by 75% of the equity holders. *Id.*

76. On May 10, 1984, when Mountain West filed its plan for integration of ownership and management, it made no mention that there were any differences between equity and voting interests or that voting interests would govern its integration claim. Instead, it attributed to each partner's integration proposal an interest equal to his or her equity interest. On June 29, 1984, in a further effort to assist the parties in preparing for the hearing, applicants organized as partnerships were required to provide a full explanation of their legal organization. *Memorandum Opinion and Order,* FCC 84M-2937, released June 29, 1984. On July 20, 1984, Mountain West in its legal organization statement stated that voting rights were equal and therefore different from the partners' varying equity interests identified on May 10, 1984. Mountain West stated that the equal voting rights were established by Article Eight of the partnership agreement and Utah Code Anno. § 48-1-15(5). Those sections reflect that the partners have equal rights in the management of the partnership business. The Utah statute provides that that is the general rule unless the partners agree to alter it. Mountain West also pointed out that its partnership agreement required, in some respects, a vote of 75% of the equity interests.

77. On August 17, 1984, ten days following the filing of the written case, Mountain West amended Articles Three and Eleven of its partnership agreement. Article Three of the partnership agreement provided that, within three months of the beginning of the station's operation, the assets and liabilities would be transferred to a corporation to avoid liability. However, since no shareholders' agreement existed to preserve equal control in the corporation, Article Three was amended to permit that change only if the partners unanimously agreed. Mountain West Exh. 12. Article Eleven provided that a 50% interest could terminate the partnerhip; again without regard to voting interest, Article Eleven was changed to require a unanimous vote of all partners.[11]

78. On August 3, 1981, the partnership agreement was also amended to reflect that partners David S. Lee, Douglas J. Cardon, and Brent K. Pratt had agreed to withdraw and assign their interests to Joseph C. Lee, Jo-Ann Wong, and George L. Gonzales. Mountain West Exh. 11. On August 6, 1981, the B

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[11] Petition for Leave to Amend, filed August 20, 1984 by Mountain West Television; granted in *Memorandum Opinion and Order,* FCC 84M-4036, released September 21, 1984. (These changes were received at the hearing subject to the prohibition that Mountain West could not use them to improve its comparative position. Tr. 576.)

cut-off date, Mountain West filed amendments to its application which included a substitute ownership table. Appendix A to Amendment No. 1. Appendix B to that amendment also named the four general partners and gave their titles but none of the filings provided any information about the claim that each partner's voting rights would be different than their ownership interests.

79. The Mountain West partnership agreement provides, or provided before the August 1984 amendment, that voting will be weighed by ownership interest when at issue are termination of the obligation to make future contributions, § 4.02, distributions from the partnership, § 5.02, sale of the partnership property, execution of notes or mortgages, deeds and long term leases, § 8.02(b), amending or modifying the agreement, § 10, and termination of the partnership, § 11. Intermountain Exh. 6.

80. Ms. Wong stated that it was her view that she would have an equal vote in the partnership, even though she held 12% of the equity (Tr. 455); however, it was not a view she based on any experience since there had not been any partnership votes. Tr. 464. Nevertheless, when questioned about the partnership agreement, she conceded that in some major matters the vote would be according to equity interest. Tr. 459-62. Mr. Lee also agreed that some aspects of management of the partnership would be decided by equity interest. Tr. 528-29. Mr. Gonzales stated that until August 1984, shortly before the hearing, equity interests were to be weighed in voting on partnership matters. Tr. 620-21.

81. The initial organization of the partnership took place in Washington, D.C. where Mr. Foulger and his son-in-law (who was then a partner) operate a construction company and live. Tr. 699-700. All who were partners at that time attended the organizational meeting except Ms. Wong and Mr. Gonzales. Tr. 699-705. It was then that the partnership agreement was signed. Tr. 701. While Ms. Wong and Mr. Gonzales were present at other meetings with some partners, no decisions were made at those meetings and it appears that there has never been a partnership vote. Tr. 464. Neither Ms. Wong nor Mr. Gonzales knew how the decisions were made about what positions they would hold at the station; they were simply informed about the jobs they would hold. Tr. 466, 624. They also did not know the terms of the loan from Mr. Foulger's construction company to Mountain West. Tr. 452, 453, 630-31, 712. Mr. Foulger's construction company has lent Mountain West $10,000. Tr. 712. Ms. Wong was not consulted about the loan. Tr. 453. Both Ms. Wong and Mr.

Gonzales contributed to the partnership when asked. Tr. 448–49, 684, 689. Ms. Wong and Mr. Gonzales indicated that they had not been involved in their business of the partnership, although after decisions had been made their approval was sought. Tr. 646–47, 612, 616, 483–84, 444, 445. (Compare Tr. 629, 631, 712). That is, they were consulted, except with regard to what role any of the partners would play in running the station. Tr. 704, 706. Even matters as significant as amending the partnership voting rights were simply presented to Ms. Wong and Mr. Gonzales for their concurrence after a decision had been reached. Tr. 646.

82. At the time Ms. Wong entered into the partnership agreement, she had not discussed with any of the partners her financial contribution to the partnership. Tr. 445. Mr. Foulger testified, moreover, that while everyone would guarantee loans to Mountain West, he realized that Ms. Wong and Mr. Gonzales have limited financial resources and that would be a consideration in repayment. Tr. 709–10, 713. Neither Ms. Wong nor Mr. Gonzales have increased their contributions to the partnership as their interests have increased. Tr. 638, 632–33, 445. Ms. Wong and Mr. Gonzales did not meet Mr. Foulger until June 1984. Tr. 703–04.

83. Jo-Ann Wong has lived in Salt Lake City her entire life, except during two short periods. Mountain West Exh. 2 at 1. She currently resides in Salt Lake City. *Id.* Ms. Wong is a female of Chinese descent. *Id.* She worked as a general assignment reporter and receptionist from March of 1972 until September of 1974 at KCPX–TV (now KTUX). Mountain West Exh. 2 at 1. During some of the time she worked at KCPX–TV she was a reporter and receptionist, then she worked primarily as a receptionist and, in her free time, as a reporter. Tr. 438, 480. However, her job eventually became exclusively that of a receptionist. Tr. 439.

84. Ms. Wong will work full time as Program Director. She will coordinate functions of continuity, traffic, promotion and sales. Mountain West Exh. 2 at 3. Ms. Wong will direct the staff in the creation of programs to meet community needs, including children's programs and discussion programs addressing community problems. *Id.* at 3–4. She will also act as liaison on behalf of the station with the Asian community in Utah. *Id.* at 4. The determination about what job Ms. Wong would hold at the station was suggested to her by Mr. Lee and she agreed to that job. Tr. 465–66. Ms. Wong does not know when the decision was reached. Tr. 466. Ms. Wong has not discussed with anyone whether she will be responsible for supervising any employees. Tr.

481. She does not know what the staffing plans are, or for that matter how many employees will be hired for the programming. Tr. 481–82.

85. Ms. Wong has been a member of Chinese for Community Action ("CFCA") for over seven years. CFCA is a non-profit organization which promotes Chinese culture and compiles the history of the Chinese in Utah. Mountain West Exh. 2 at 1–2. She is Editor of the CFCA Newsletter which acts as a link for the Chinese community by providing cultural articles, upcoming events, information, and stories about other Chinese people in the community. Tr. 473–74. Ms. Wong currently serves as the media representative for the Governor's sixteen-member Asian-American Advisory Council which advises the Governor and state agencies on policies affecting Asian-Americans. Mountain West Exh. 2 at 2.

86. Joseph C. Lee will work full time as Station Manager. Mountain West Exh. 3 at 4. He will be responsible for the daily supervision of station operations, hiring, serving on the Program Committee, and coordinating the engineering staff. *Id.* He was originally approached about becoming a partner by his son, who lives in Washington, D.C. Tr. 561. He decided to join with his son, his son's business partner, Mr. Foulger, and Mr. Pratt, who is Mr. Foulger's son-in-law and a friend of Mr. Lee's son in a partnership to apply for the Salt Lake City channel. Tr. 561–62. All of the original partners live in the Washington, D.C. area except Mr. Lee. *Id.* Mr. Lee did not select the other initial partners but was invited to join the existing group. Tr. 561. He is currently a resident of Salt Lake City, having lived in the city since 1948. *Id.* at 1.

87. Mr. Lee joined KDYL AM/FM/TV (Channel 4) in Salt Lake City in January 1948. *Id.* at 2. He worked at the station as an announcer and newscaster and it was there that he participated in Utah's first television broadcast. He has worked at local radio and television stations since then in management and programming positions. *Id.* at 2–3. In addition, Mr. Lee is currently Communications Director for a local church congregation, for which he publishes a monthly newsletter. *Id.* at 4. He has also served as president of the church choir. *Id.*

88. George L. Gonzales would work full time as Channel 13's Community Affairs Director. Mountain West Exh. 4 at 3. Mr. Gonzales did not determine that he would be the Community Affairs Director; other persons determined that when the application was filed and, afterward, he was asked whether he would

work in that position. Tr. 623–24. Mr. Gonzales believes his job at the station will have as its primary responsibility the production of his current radio show on television. Tr. 653–54. He stated this would take one-half to two hours per week. Tr. 657–58. Mr. Gonzales has resided in Ogden, Utah for the past thirty-two years. Mountain West Exh. 4 at 1. Ogden is within the service area of the proposed television station. *Id.* Mr. Gonzales is an Hispanic American. *Id.*

89. Mr. Gonzales has worked at Hill Air Force Base since his arrival in Utah in 1952. *Id.* If the application of Mountain West is granted, he will resign that position. *Id.* at 3.

90. Mr. Gonzales became involved with the Spanish-American Lodge in the mid-1950's for approximately 18 to 20 months. *Id.* at 1, Tr, 593. As President, he worked to unify the Hispanic community in the Ogden area. *Id.* Similarly, his tenure, during the same time, as a member of the Junior Chamber of Commerce was devoted to improving relations between local businessmen and the Latin American community. *Id.*

91. Between 1952 and 1978, Mr. Gonzales hosted a show on KVOG(AM) (now KJQN) Ogden, Utah, entitled "El Rancho Grande" in an effort to change the community's perception of Hispanic people. *Id.* at 2. This bilingual program provided a source of entertainment for Hispanics, and it educated non-Hispanics concerning Latin culture. *Id.* Mr. Gonzales worked as host, broadcast announcer, commercial producer and sales specialist for the show. *Id.* In 1978, Mr. Gonzales moved the show to KBBX(AM), Centerville, Utah, and renamed it "Programma-Tocadisco." The show continues to air weekly for three hours. *Id.*

92. Mr. Gonzales has been involved with television broadcasting through his role as producer and host of "El Rancho Grande" aired on KTVX, Salt Lake City Channel 4 between 1970 and 1983. *Id.* The program provided a forum for local Hispanic talent as well as a platform for discussion of issues of interest to minorities in Utah. *Id.* Mr. Gonzales received no compensation, beyond expenses, for producing and hosting these shows. *Id.*

93. Sid W. Foulger will work full time as President and General Manager of Channel 13. Mountain West Exh. 5 at 2. In that capacity he will award contracts, supervise studio and transmitter construction, oversee financial matters (including ultimate responsibility for the property and assets of the station), monitor key personnel hiring, serve as an advisor to the Program Committee, advise the Community Affairs Committee, and make decisions, subject to partnership approval, on major purchases. *Id.* He will

also arrange the financing of the station along with Mr. Lee. Tr. 708, 710-11. He was born in Ogden, Utah, where he lived until 1940 when he attended the University of Utah located in Salt Lake City. *Id.* Excluding two and a half years in the United States Navy, Mr. Foulger lived in Salt Lake City until August 1960, when he moved to the Washington, D.C. area. *Id.*

94. Beginning in 1973, Mr. Foulger became involved in several business ventures in the Salt Lake City area, and began to divide his time between Salt Lake City and Washington. *Id.* Since 1977, he has owned a residence in Salt Lake City. *Id.* Mr. Foulger spent most of his time in Salt Lake City from 1976 through 1981. Tr. 696-97. In addition, Mr. Foulger has spent a minimum of six to eight weeks in Salt Lake City in each of the last three years. Tr. 697-98. If Mountain West is successful in its application for Channel 13, he will again have his principal residence in Salt Lake City. Mountain West Exh. 5 at 1.

95. Since 1978, Mr. Foulger has been a member of the Salt Lake City Chamber of Commerce. *Id.* He has met with the Chamber on numerous matters regarding the downtown area of Salt Lake City and promoting the city and business activity there. Tr. 692. In about 1980, he was appointed to a local urban planning committee by the Mayor of Salt Lake City. Mountain West Exh. 5 at 1. Through the committee he has participated in reviewing a study concerning residential facilities and general urban planning of downtown Salt Lake City. Tr. 695.

96. *Diversification.* Neither Mountain West nor any of its partners has any interest in any medium of mass communications. Mountain West Exh 1 at 1.

(e) West Valley City Television Associates, Limited Partnership

97. *Integration of ownership and Management.* West Valley is a limited partnership with two general partners, Lela M. Ence and Robert S. Fotheringham, and two limited partners, H. Roger Boyer and Kem C. Gardner. Each partner has a 25% interest in capital, losses, profits and distributions of the partnership. West Valley Exh. 1.

98. West Valley Exhibit 1 states that the general partners are entrusted with full and complete discretion in the management and control of the partnership. Thus far, there have been no decisions of the partnership in which the limited partners have not participated. Tr. 784. Mr. Boyer regularly discusses the application with Mr. Fotheringham on the phone. Tr. 931, 962.

Mr. Boyer's involvement in discussions regarding partnership decisions in this case has been similar to his participation in an application for Channel 14 in Salt Lake City, an application in which he was a voting shareholder, officer and director of the applicant. Tr. 956–66. Mr. Boyer conceded that limited partners often want to become active in running the business. Tr. 959. The primary restraint in their becoming more involved is their relationship with the general partners, not any legal restraints. Tr. 960–61.

99. The West Valley limited partnership specifically gives the limited partners the right to approve the salaries of the general partners. Family Exh. 7 at 8. If the limited partners did not like the conduct of the general partners, they could refuse to approve a reasonable salary and force them out. Tr. 986. The partnership agreement also provides for the calling of meetings by the limited partners. Family Exh. 7 at 17. There, the business of running the station could be discussed (Tr. 763–64), including how money is spent, what programming is purchased, and other relevant concerns about the running of the business. Tr. 764. Seventy-five percent of the limited partnership interest must approve any amendment to the partnership agreement. Family Exh. 7 at 17. Limited partners must approve the sale of the station. Family Exh. 7 at 6; Tr. 926.

100. Ms. Ence did not know who drafted the partnership agreement. The agreement was presented to her in a completed form and she signed it. Tr. 781. She never discussed the provision requiring that the limited partners approve her salary. Tr. 760. Mr. Fotheringham thought the agreement had been written by Ralph Hardy, the applicant's former Washington communications counsel. Tr. 808. No one explained the agreement or discussed it with Mr. Fotheringham, although that had been the usual practice in previous partnerships in which he has been involved. Tr. 810. In fact, the partnership agreement was drafted by a Salt Lake City law firm which represents Mr. Boyer and his development company. Tr. 938.

101. All partnership books and records are kept by limited partner H. Roger Boyer. Tr. 772. This includes the partnership's checkbook. Only he signs checks for the partnership. Tr. 933. Neither Mr. Fotheringham nor Ms. Ence are authorized to sign checks. Tr. 814, 783–84.[12] Even Mr. Boyer acknowledged that it is unusual for a limited partner to maintain a partnership check-

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[12] The West Valley application states that only the general partners could draw on the account. Mr. Boyer could not explain that statement. Tr. 947–48.

book. Tr. 933. He has never been in another partnership where that arrangement existed. Tr. 949. He has been involved in approximately 30 or 40 limited partnerships. Tr. 924. Both Mr. Boyer and Mr. Fotheringham claim that this arrangement was established for convenience and because Mr. Boyer had sufficient staff to maintain the books. Tr. 948, 814. However, this arrangement involves Mr. Fotheringham receiving the bills and forwarding them to someone in Mr. Boyer's office, who prepares the check and gives it to Boyer for signature. Tr. 973–74. There have been very few checks written. Tr. 973. Neither Mr. Boyer nor Mr. Fotheringham could explain why this system would be more convenient than simply having Mr. Fotheringham write the checks as he receives the bills. Tr. 826, 949. The limited partners have participated in discussions with competing applicants regarding settlement. Tr. 776, 961.

102. The bank letter promising financing to the partnership was addressed to the partnership at Mr. Boyer's office address. Tr. 774. Mr. Boyer approached the bank about receiving a loan commitment. Tr. 927. The letter of credit from the equipment supplier to the partnership was also addressed to Mr. Boyer's office. Tr. 774–75. The principal office address given in the partnership agreement is also that of Mr. Boyer. Tr. 774[13] Mr. Boyer explained that his office was selected as the "principal place of business" because of parking and accessibility. Tr. 968. However, Mr. Boyer acknowledged that the "principal place of business" is a legal term for mailing purposes and for legal reasons; meetings do not in fact have to take place there. Thus, he conceded, parking in fact had nothing to do with the selection of the Boyer Company as West Valley's principal place of business. Tr. 976.

103. It is Mr. Boyer's view that limited partnerships are normally created to provide limited liability to the limited partners. Moreover, he believes that in general, limited partners would be obligated to contribute only a finite sum of money. Tr. 769, 957–58. In this partnership, there is no limitation on the amount of capital a limited partner might be called upon to contribute. Family Exh. 7 at 2–3. Additionally, each limited partner has agreed to guarantee the bank loan to the partnership. Tr. 771. Before providing such a guarantee, Mr. Boyer would closely review the financial projections and plans of the partner

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[13] Messrs. Boyer and Gardner share offices and are involved in a number of businesses together. Tr. 970–71.

ship, and, if not satisfied, might demand changes in these plans. Tr. 945–46.

104. In the event additional funds are needed, more capital contributions from the partners would be requested. Tr. 981. If the limited partners were not forthcoming with their share of additional contributions, the general partners could not admit a new limited partner to make up the difference without consent of the existing limited partners. Tr. 1002; Family Exh. 7 at 3. A general partner is barred from selling his partnership interest. Tr. 1003, 778. Ms. Ence had never discussed what would happen if she were to decide that she wanted to leave the partnership. Nor has she ever discussed what would occur if the limited partners failed to make their equity contributions. Tr. 778.

105. Lela M. Ence proposes to be General Manager of the West Valley station on a full-time, 40 hour per week basis. West Valley Exh. 2 at 3. Robert S. Fotheringham proposes to be General Sales Manager and Director of Promotion on a full-time basis. West Valley Exh. 3 at 3.

106. Ms. Ence has lived in Holladay and Sandy, Utah for her entire life. Both communities are within the city grade contour of the proposed station. West Valley Exh. 2 at 1. Robert Fotheringham was born in Ogden, Utah. In 1944, he moved to Salt Lake City where he resided until 1968 (except for 1964-1966). For the last 12 years he has lived in Murray, Utah. Murray and Salt Lake City are within West Valley's proposed city-grade contour. Ogden is located within its Grade A contour. West Valley Exh. 3 at 1.

107. Ms. Ence has been active in civic affairs. West Valley Exh. 2 at 1–3. Both Ms. Ence and Mr. Fotheringham claim credit for participation in the Beehive Hall of Fame. West Valley Exh. 2 at 2–3. The Beehive Hall of Fame consists of a set of pictures of famous persons with some relationship to Utah in the hallway of a Marriott Hotel in Salt Lake City. The Marriott is the client of Mr. Fotheringham's advertising agency, and the decision to start the Hall of Fame was a decision of his agency. The reason that he considers it a civic activity is because he does not get paid for working with it. Tr. 793. Mr. Fotheringham claims credit for being a member of the Governor's Committee for Gifted and Talented Children, a position which did not begin until 1984. West Valley Exh. 3 at 1. In 1984, he was also named a Director of the Salt Lake City Chapter of the United Way, although he may not yet have begun to function in that position. Tr. 801–02. In 1983, he served as a coach for a girls softball team. Mr.

Fotheringham also claims credit for membership in certain business groups, and activities with his church. West Valley Exh. 3 at 1-2.

108. Ms. Ence is a female. West Valley Exh. 2 at 2. Mr. Fotheringham was employed as Sports Director and an on-air announcer for KMOR(AM), Murray, Utah from 1972 to 1975. He also served on the Board of Directors of non-commercial station KUED, Salt Lake City, from 1976 to 1977. West Valley Exh. 3 at 2.

109. *Diversification.* Kem Gardner, a 25% limited partner in West Valley, and the wife of Roger S. Boyer, the other limited partner of West Valley, each own a 9% interest in KRXV, Inc., licensee of Station KRXV(FM), Yermo, California and KXVR(FM), Mountain Press, California. West Valley Exh. 6. Neither Mr. Gardner nor any of the other principals of West Valley hold any other interest in any medium of mass communications. *Id.* Valley Exh. 3 at 2.

CONCLUSIONS OF LAW

Waiver of § 73.685.

110. Three applicants, Intermountain, Mountain West and West Valley TV, propose directional antennas that do not comply with § 73.685. That rule limits the ratio of maximum to minimum radiation in the horizontal plane to no more than 10 dB on VHF Channels 2-13 because, at the time of § 73.685's enactment, it was feared that an antenna radiation pattern would become unstable if more than 10 dB directivity was allowed. *Table of TV Channel Allotments,* 83 F.C.C. 2d 51, 101 n. 100 (1980). West Valley TV proposes radiation of 22.5 dB, Intermountain proposes 14.9 dB and Mountain West proposes 10.6 dB.

111. In 1980, the Commission indicated that it intended to change § 73.685(e) to allow suppression ratios greater than those currently provided in the rules. *Table of TV Channel Allotments,* 83 F.C.C. 2d at 101 (1980). It is now the Commission's view that currently available transmitter antenna technology can maintain "acceptable" interference levels at 15 dB in any direction, compared to the signal strength in the maximum direction of radiation. *Id.* at 101. Moreover, the Commission has stated it would permit signal suppressions of up to 25 dB if the applicant can demonstrate that there will be no reflected signals of

unacceptable level into the null. *Id.* The applicant would need to show that "the immediate topography surrounding the (proposed) antenna site [is] free of large buildings or large natural obstructions that might serve as reflectors into the antenna pattern nulls, and . . . that the frequency of the transmitter is sufficiently stable to ensure the antenna acts as designed." *Id.* at 101 n. 101.

112. Intermountain and Mountain West will maintain a radiation level that will be less than the 15 dB radiation which the Commission believes is acceptable with current technology. West Valley TV will come within the 25 dB level and has made the particularized showing necessary to maintain a signal radiation level between 15 and 25 dB. Although the Commission believes that current antenna technology is normally capable of maintaining 15 dB signals, Intermountain and Mountain West have specifically demonstrated that their antennas will do so. Intermountain's showing is based on existing experience with its proposed antenna and Mountain West's showing relies on the representations of the antenna's manufacturer. West Valley would assure appropriate stability by using precise frequency offset. There is no evidence in the record to show that their antennas will not act as designed. Each applicant has also shown that there will be no reflected signals into the null and that there are no large buildings or natural obstructions that might serve as reflectors into the antenna pattern nulls. There is, therefore, justification for concluding that the interference concerns that precipitated the 10 dB level restraint in § 73.685(c) will be met by these applicants at levels that exceed 10 dB. Their proposals will achieve the Commission's public interest concerns by meeting the policy objectives of § 73.635(e) with current technology; they have presented substantial evidence that waiver of § 73.635(e) is warranted. *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969).[14]

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[14] Before the Commission's reexamination of antenna technology in 1980, applicants that proposed exceeding the 10 dB standard were required to demonstrate that service advantages outweighed any risk of antenna instability that would result from exceeding the 10 dB radiation level. Acceptable showings required particular data about gains and losses of areas and populations. Intermountain, Mountain West and West Valley TV have made half-hearted assertions about the service advantages of their proposals, but, as UTA and Family argue, their showings do not sufficiently establish their claims. Nevertheless, in this case waivers are warranted for the different reason that each has shown its technical proposal is compatible with Commission interference concerns.

Mountain West's Studio Location Outside Salt Lake City

113. Mountain West proposes locating its studio outside the boundary of Salt Lake City. This location, which is in the center of the Salt Lake City Valley, and less than a mile from Salt Lake City, will be more accessible to the public within the entire service area. Nearby major highways will make Mountain West's studio as accessible to the public as a location in downtown Salt Lake City. Renting of space will also be less costly and provide more money for program production, according to Mountain West. The applicant would, however, provide a sales office in downtown Salt Lake City. The proposed location will also assist in maintaining a line of sight path between Mountain West's proposed studio and its proposed transmitter. It is evident that Mountain West will be able to fulfill its public interest obligations to Salt Lake City from a studio location immediately outside the boundary of Salt Lake City.

Comparative Considerations

Diversification of control of the Media of Mass Communications.

114. *Utah Television Associates* Principal Andrew Lawrence owns 10% of the licensee of KQZR (FM), Craig, Colorado; he is an officer and director. In addition, he owns .25% of the licensee of Channel 38 in New Orleans, Louisiana. These broadcast interests are not controlling and they are distant from the proposed service area of the Salt Lake City facility. The record does not reflect whether KQZR (FM) is significant regionally or in the immediate locality. (Commission records show that at least two other broadcast facilities are assigned to Craig, Colorado.) Mr. Lawrence's general partnership interest in UTA is 44.66%. He is the General Manager of UTA's general partner, UTEC, and proposed General Manager of the Salt Lake City station.

115. In this context, his media interests warrant only a very slight demerit in this proceeding. A demerit is assessed, in part, because of his significant interest in UTA and, in part, because of his ownership responsibility for KQZR (FM).[15]

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[15] In addition, J. U. Investment Associates, a limited partner, is controlled by Robert S. Understein who owns limited partnership shares in broadcast facilities. Until November 1983, Larry D. Benes held a .1% limited partnership interest in a partnership that holds a 20% interest in a construction permit for Channel 12 in Medford, Oregon. The interests of Messrs. Understein and Benes are far removed from control of this application and control of the licensees they have interests in, and the facilities are too distant from Salt Lake City

116. *Family's* 1% stockholder, Erma Freeman, owns 2%, and is a director and officer, of High Country Broadcasting, Inc., the permittee of an unbuilt UHF television station at Reno, Nevada. Jack Dalton, another 1% stockholder of Family, owned at the cut-off date a one-third limited partnership interest in Springfield Television Associates which is the permittee of KSPR, an unbuilt television station in Springfield, Missouri. These distant media interests are held by stockholders who neither control this applicant nor the media interests they hold. Moreover, they will have no part in the operation of the Salt Lake City facility. Their interests do not affect diversification of control of the media of mass communications. *See Greater Wichita Telecasting, Inc.*, 96 F.C.C. 2d 984, 986–88 (1984).

117. *West Valley T.V.'s* ostensibly limited partners, Kem Gardner and Roger S. Boyer, through his wife, hold a 9% interest in KRXV, Inc., the licensee of two FM radio stations in California. Neither Mr. Gardner nor Mr. Boyer would work in the daily operation of Channel 13 and their interests in KRXV, Inc. are not controlling, either individually or collectively. In addition, the stations are in communities distant from Salt Lake City. Like Family's media interests, these interests are too minor to warrant comparative consideration. *Intermountain* and *Mountain West* have no media interests.

Participation in station operation by owners.

118. *UTA* is organized as a partnership with two general partners and three limited partners. One of the general partners is the corporate entity, UTEC, which UTA claims will act as the managing general partner. Two of the four stockholders of general partner UTEC, Richard S. McKnight and Arnold S. Orleans, are also limited partners; another UTEC stockholder, G. Andrew Lawrence is individually the only other general partner of UTA; and UTEC's fourth and largest stockholder, Dennis Valenzuela, has no other partnership interest, either limited or general. Most UTA partners not only have double partnership interests, but operating profits are distributed by another formula that does not match a person's share in the partnership.

119. According to UTA, Mr. Lawrence's combined general partnership interests represent 44.66% of the general partnership. No other general partner holds as much. Although Mr. Lawrence

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and too insignificant with regard to coverage to warrant comparative consideration.

proposes to become the station's General Manager, he has in the recent past made similar representations in Commission licensing proceedings and not fulfilled them. In 1978, Mr. Lawrence applied with others as Tri-City Broadcasting for an FM facility for Craig, Colorado. He told the Commission that he would move to Craig, Colorado and manage the station. After Tri-City's application was granted wtihout a hearing, he neither managed the station nor moved to Craig. The implication of his testimony in this proceeding is that that promise was tentative; it was made only so long as it was necessary to win a comparative proceeding. In part, the problem with that excuse is that there is no way of telling whether he would have left his home in Alexandria, Virginia for Craig, Colorado even if a comparative hearing had been held. But most importantly, there is no evidence that Mr. Lawrence ever told the Commission that his promise was indefinite, or dependent on a comparative hearing being held.

120. At the time Mr. Lawrence applied for the Craig, Colorado facility, he operated a consulting firm in Alexandria, Virginia; he still does. Based on his past behavior it cannot be concluded that he would leave that business, move across the country to Salt Lake City, and manage a television station. He has no broadcast experience and no association with the community; thus, there are no facts to counter the inference that arises from his past conduct in the Craig proceeding. His promise of integration here is not credible.

121. Dennis Valenzuela, who is Hispanic, proposes to work full time at the station. Mr. Valenzuela was persuaded to join this applicant by Mr. Lawrence. Mr. Lawrence knew of Mr. Valenzuela from Gordon Jones, Mr. Valenzuela's brother-in-law. Mr. Valenzuela is UTA's only minority owner. At the B cut-off, UTA attempted to transfer 80% of the ownership of the general partner, UTEC, to Mr. Valenzuela but when it became apparent that that change would be considered a transfer of control, Mr. Valenzuela's ownership was reduced to 49%.

122. Before the B cut-off, Mr. Valenzuela was not a shareholder of the general partner UTEC. It was owned in equal parts by Messrs. Lawrence, McKnight, and Orleans, who were also the officers and directors, with .5% held by Larry D. Benes. When Mr. Valenzuela was made an 80% owner, Messrs. Lawrence, McKnight and Orleans' interests in UTEC were reduced proportionately and when Mr. Valenzuela's interest was decreased to 49%, their interests increased proportionately to 17%. Mr. Valenzuela, who was a stranger to Messrs. McKnight, Orleans

and Lawrence, was invited to join UTA to insure that UTA would receive a minority preference and UTA sought to maximize that preference by transferring as much stock to him as possible.

123. The *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965) holds that it is desirable to have legal responsibility and day-to-day performance closely associated; it is, moreover, a factor of substantial importance. Owners' participation is to be assessed in terms of the position they will occupy, in order to determine the extent of their participation in the formation of policy and the likelihood that they will play important roles in mangement. *Id.* The opposing applicants have questioned whether Mr. Valenzuela will actually exercise the management responsibility his 49% share of UTEC would appear to indicate. The facts developed in this record demonstrate Mr. Valenzuela's proposed integration as a principal manager of UTEC and UTA is not likely.

124. Mr. Valenzuela was not part of the original formation of UTA and he has no apparent reason for being associated with the other owners except that none of them are minorities and he is. While he lives within the service area of the proposed station, he has not thus far demonstrated any ownership responsibility in the applicant or any interest in having any. Mr. Valenzuela contributed only $490 for his 49% interest in UTEC and he does not expect to have to contribute any more. In contrast, Mr. McKnight paid more than 20 times the proportionate price per share paid by Mr. Valenzuela, at least $40,000.

125. Mr. Valenzuela did not know any of the other principals of UTA before he was recruited by Mr. Lawrence. Since 1981, when Mr. Lawrence called him, he has had virtually nothing to do with making decisions about the proposal or about the operation of the partnership. He was unaware that he had been originally designated in the application as the station's Program Director, and even his ultimate designation as News Director was made by the other shareholders and he simply went along with it. Currently, when partnership business decisions are made, he is notified and routinely ratifies those decisions.

126. Ostensibly, Mr. Valenzuela is a Vice President, Treasurer, and a Director of UTEC. But when questioned at the hearing he believed he was the Secretary, until it was pointed out that he is the Treasurer. His answer was not surprising, he has not kept the corporation's books and records, was unaware of the corporation's bank account, and does not have authority to sign corporate checks. (Mr. McKnight stated that he was unaware that Mr.

Valenzuela was a director of UTEC.) Mr. Valenzuela did not know what it meant to vote his stock and he did not know what his share of the profits would be. He has never exercised ownership responsibility and it is his belief that Mr. Lawrence exercises decisional authority over all matters.

127. It is apparent that Mr. Valenzuela has exercised no legal responsibility and it cannot be concluded that he will have anything to say about the day-to-day performance of the station. His overall demeanor and testimony exhibit that he is reticent to assert any role in policy making at the station. He has no specific idea about what his job will be except that it will offer a post-retirement opportunity to supplement his pension income when he retires this June.

128. The opponents have also argued that Mr. Valenzuela's promise to act as news director is at variance with the application which stated that he would be program director. They would discredit his promise on that ground also. But even if that promise is unreliable, UTA has always represented that Mr. Valenzuela would become the Director of Public Affairs. The Commission's reasons for not permitting an applicant to change its proposal after the B cut-off are to prevent a constantly shifting and changing proposal and to prohibit any unfairness that might result to the other applicants from repeated improvements in a proposal. The change in Mr. Valenzuela's proposal is the very shift in position which the Commission has tried to prevent.[16] Nevertheless, the changes in UTA's representations about Mr. Valenzuela are unimportant since whatever his exact position is, it is not one that will be combined with ownership authority.

129. Richard S. McKnight proposes to work full time at the station as its business manager. The opposing parties urge that Mr. McKnight's promise is at variance with the application at the B cut-off date; they rely on two aspects of UTA's filing to demonstrate their argument: UTA stated in its application that limited partners under Utah law could not be involved in the management of the business or they would lose their immunity from liability. UTA's partnership agreement, furthermore, prohibits limited partners from exercising any rights in management as limited partners. UTA also put forward in its application at the B cut-off a list of managers which included Messrs. Lawrence and

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[16] While it is a moot matter, UTA's change in Mr. Valenzuela's job may have been beneficial to the other applicants since News Director is a position of less overall responsibility than program director.

Valenzuela, but not Mr. McKnight. And, although UTA presented a comprehensive list of management positions, it did not include the position of business manager, which it now proposes for Mr. McKnight. The opposing parties argue that it was UTA's intent to apprise the Commission that limited partners, such as Mr. McKnight, would not participate in management and that the Commission could assume that only general partnership interests would be managing.

130. Additionally, they point out, that UTA, in order to insure that there would be no question that limited partners would not participate in management, specifically designated what role each general partner would play. In part, it appears that the care UTA took to advise the Commission about which partners would operate the station helped to demonstrate the credibility of Mr. Valenzuela's 80% interest in the managing general partner, UTEC. Then too, without the detailed explanation of each partner's role in UTA's application, there would have been every reason for counting Messrs. McKnight and Orleans' combined interests in determining shares for integration purposes since it would have appeared that the division between limited and general partners was without meaning in an application where limited partners are also owners of the managing general partner.

131. Mr. McKnight agrees that when the B cut-off amendment was filed he did not propose to actively participate. It was only after the B cut-off date that he decided he could or would participate. While he has testified that he could not participate when the B cut-off amendment was filed because he was busy, his full testimony reflects that that was not the reason he was not listed as a manager; the decision about who would manage and the reasons for that determination were made by Mr. Lawrence and UTA's counsel. Given these facts, the Commission — and the other applicants — had every reason to believe that it had been informed by UTA that limited partners, even if in other respects they were general partners, would not participate in management. And, therefore, UTA's change of mind is a variance from that representation; Mr. McKnight's participation cannot be credited. *See Washington's Christian Television Outreach, Inc.*, 56 Radio Reg. (P&F) 2d 1539, 1556 (Review Board 1984).

132. *Intermountain Broadcasting, Inc.* proposes to integrate into management both of its owners, David R. Williams and Deanna M. Williams. Mr. Williams owns 55% of Intermountain's voting stock and his wife, Deanna Williams, owns the remaining 45%. They both propose to work full time in managing the

station. The Williamses made their promise of full-time employment when they filed their application on March 10, 1981. However, on November 8, 1982, they also promised the Commission that they would work full time in the operation of a cellular mobile telephone system if their wholly owned corporation, Utah Telecourier, Inc., was granted a license for Salt Lake City. These inconsistent promises existed concurrently from November 1982; moreover, in their representations to the Commission, the Williams did not indicate that either promise was conditional.[17]

133. Intermountain did amend its application to inform the Commission about the Williams' cellular mobile telephone application, but it did not mention their promise to work full time in operating the system. In fact no mention was made by them until they were examined on their written testimony at the hearing in August of 1984. When questioned, Mr. Williams stated that he intended to follow whichever promise was first granted. As for Ms. Williams, she appeared to be unaware of her promise to work full time at the cellular telephone system; it is a point which Mr. Williams' testimony appears to corroborate since he did not ask or consult her before representing to the Commission that she would work full time.

134. The Williamses restated their promise to work full time at the television station in an integration proposal filed May 10, 1984 and again on August 7, 1984 when they filed their written testimony. They did not, in either filing, indicate that they had made a promise to work full time in operating a cellular mobile telephone system.[18] At the close of the record in this proceeding both promises existed.

135. The Commission prefers stations operated by owners who live in the community because those owners are more likely to design the station's programming to meet an area's changing

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[17] Mr. Williams did testify that he has never waivered from his promise to work full time at the television station. On that basis, Intermountain would credit his integration proposal because his claim infers that if any promise was tenative, or untruthful, it was that made by him in the cellular proceeding.

[18] By April of 1984, there appeared to be no decisional importance to the promise in the cellular proceeding since the Commission decided that the Salt Lake City cellular system operator would not be selected in a comparative hearing but by lottery; it was also apparent by then that the integration of owners into the operation of a cellular system would probably not be important in comparing cellular applicants even if hearings were held. Nevertheless, Mr. Williams continued to hope, during the summer of 1984, that the Commission would reconsider and change its mind about the lottery and his counsel hoped that integration credit would be given in those proceedings, as it had been previously in mobile telephone cases.

needs. Because the Commission attaches significance to such promises, it is important that they be made in good faith. *Tidewater Teleradio, Inc.*, 45 FCC 1070 n. 2 (1962). While the Williamses maintain their promises to participate have been made in good faith, their actions give rise to a different conclusion. Without any express reservation they made essentially simultaneous unequivocable promises to participate full time in return for receiving two different licenses. It was only when those promises were called to Intermountain's principals' attention that they maintained that their promises were conditonal.

136. Moreover, Intermountain is incorrect when it argues that maintenance of completeness and accuracy about its application did not require reporting its promise to work full time in operating a cellular system. There is little doubt from the facts of record that Intermountain believed its representations about the participation of its principals would be of decisional significance in both proceedings. Once they had made two similar but conflicting promises in different proceedings, they were obligated to explain to the Commission that the conflict existed and how both promises could be fulfilled. Intermountain's failure to explain gives rise to the conclusion that its representations about working full time were made to gain a tactical advantage since its principals knew from the outset that they could not satisfy both representations. It also is evident that Intermountain's principals knew the importance of their representations. It can only be concluded that it did not report that fact in this proceeding because it would have destroyed the advantage of the promises. Intermountain's integration proposal cannot be credited because it was not put forward in good faith. In addition, it will receive a demerit for not reporting the full facts about a matter which it knew would be of decisional significance.

137. *Salt Lake City Family Television* proposes to integrate its current two stockholders, Rebecca Bain Hewgley and Patrick David Crants into management and day-to-day operation of the station. Ms. Hewgley, a director and officer, holds 47% of the stock for comparative integration purposes, and would be the full-time Station Manager. Mr. Crants is a director and officer, holds 51% of the stock, and would be the full-time General Manager.

138. At the B cut-off there were two other stockholders, Erma L. Freeman and Jack H. Dalton, each of whom held 1% of the stock. The early presence of Ms. Freem and and Mr. Dalton, the opposing parties argue, makes Mr. Crants and Ms. Hewgley's

control suspect. This argument is inferred from Mr. Dalton's relationship to Ms. Hewgley, Mr. Crants, and Ms. Freeman; his role in advising Ms. Hewgley; his suggestion that Ms. Freeman prepare the application; and his early, although not initial, ownership of 1% of the Family's stock. Their claims, all in all, in the context of this application appear conjectural.

139. The opposing parties attempt to support their allegations with the Review Board's findings about Mr. Dalton in *KIST, Corp.*, 57 Radio Reg. (P&F) 2d 49 (Review Bd. 1984). In that case, the Review Board concluded that the application of Riverside Family Television, Inc. for television Channel 62 at Riverside, California could not be credited with the proposed 80% integration of Cheryal Kearney, a black woman who is a Los Angeles resident, because it was apparent that Jack Dalton, a 5% owner of Riverside Family, exercised control. The Board based its conclusion on the fact that Mr. Dalton had exercised all authority over and responsibility for the application and Ms. Kearney had exercised none; thus, their actual roles in running the corporation were, in effect, inversely proportional to their ownership shares. Moreover, there was no reason to believe that the relationship would change if a grant was made since Ms. Kearney had no experience as a broadcaster and did not know, nor was she known to, Mr. Dalton who was liable for the applicant's bank loan from Commerce Union Bank.

140. In this case, Mr. Dalton no longer holds any interest, the relationships between Mr. Dalton and all present and former stockholders preexisted the application, he has not provided any funds, and he no longer guarantees the loan from Commerce Union Bank. In addition, 49% of the stock in Salt Lake City Family's application is held by a woman who has nearly a decade of broadcast experience, Mr. Dalton did not initiate the application, and he has not paid the expenses of pursuing the application. His past ties to the applicant have been to offer its principals advice and, at one point, to guarantee its financing. His actions have not been at all surprising when his long-standing relationship with its principals is considered. Family has, at all times, been straightforward about his ties.

141. The opposing parties have suggested there are binding relationships between the applicant and Mr. Dalton and the station management company, Media Central, but they have not demonstrated them. During the hearing Mountain West alleged that Media Central would run the station; but that was never reliably substantiated. It is evident from the arguments made by

the opposing applicants that the Review Board's decision in *KIST, Corp.* has resulted in an aura of skepticism about any project that involves Mr. Dalton, and, perhaps, the same could be said about the consultant Sterling Communications and Media Central, apparently as a result of other proceedings. But the relationship of Ms. Hewgley and Mr. Crants to these entities must be judged on the facts presented in this proceeding, not those elicited in another case where the relationships were different.

142. After the parties filed their factual and legal arguments about the record in this case, Mountain West filed a petition to reopen the record and enlarge issues against Salt Lake City Family Television. It alleges that Salt Lake City Family Television has not identified for the Commission the real parties-in-interest, that it has misrepresented its intentions, that it has failed to report an affiliation agreement, and that it is financially unqualified. Six months ago, during the hearing, Mountain West made essentially the same claims.[19] The documents it submits, it had in its possession then and the facts it describes as new could have been known many months ago. Mountain West had not demonstrated that it "could not with due diligence have known or discovered such facts at the time of the hearing. . . ." *Stereo Broadcasters, Inc.*, 87 F.C.C. 2d 87, 115 (1981) quoting *Kern Radio Dispatch*, 29 F.C.C. 1079, 1081 (1960) *aff'd sub nom. Kidd v. FCC*, 302 F. 2d 873 (D.C. Cir 1962). Instead Mountain West waited six months to petition to enlarge and its filing is based on material known or available long ago; the issue, therefore, is whether the facts alleged demonstrate unusual and compelling circumstances.

143. Mountain West claims that Rebecca Hewgley's uncle, Jack Dalton, and Patrick Crants' brother, Doctor Crants, actually have

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[19] Salt Lake City Family principals, Rebecca Hewgley and Patrick Crants, were examined on the relationship between the applicant and Jack Dalton (Tr. 333-35, 344, 374), Doctor Crants (Tr. 376), Sterling Communications (Tr. 340-41), the relationship with Media Central (Tr. 350, 352-54), and the financial arrangements with Union Commerce Bank (Tr. 369-70, 371, 377). The handwritten list of Media Central affiliates was discussed, produced, and rejected (Tr. 355-56, 357, 380); its weakness as evidence was identified for Mountain West. Apparently no effort was made by any party to verify with Media Central the alleged Media Central contract with Salt Lake City Family. Mountain West suggests it was frustrated in pursuing the issues it now raises but as Salt Lake City Family points out, the material that raised the issues was availabale before the hearing and Mountain West did no discovery. There is, furthermore, no indication that Mountain West attempted to obtain information about Salt Lake City Family from Sterling Communications or Media Central.

an undisclosed interest in the application. The argument is not based on an actual demonstrated ownership interest but is premised on the claim that both Jack Dalton and Doctor Crants are or will be in a position to actually or potentially control. *See Creek County Broadcasting Co.*, 31 F.C.C. 2d 462, 467 (Review Board 1971). The basis of this allegation is the behavior of Jack Dalton in the application for Riverside, California and Doctor Crants' alleged relationship to Media Central and the alleged attempt by Media Central owners to use family members of Media Central principals as fronts to obtain licenses for Media Central. The differences between this proceeding and the one involving the licensing of a facility in Riverside, California, as already found, are significant and substantial; there is no reason to assume that Ms. Hewgley is a standin for Mr. Dalton from what has occurred here. The inferences to be drawn from Doctor Crants' relationship to Media Central and the alleged goal of Media Central to use that relationship to control Salt Lake City Family Television is conjectural and provides no basis for assuming Doctor Crants will exercise an interest in Salt Lake City Family, either directly or through Media Central.[20]

144. Mountain West argues that Rebecca Hewgley misrepresented Doctor Crants' relationship to this application. The record does not support that conclusion. Ms. Hewgley answered all questions put to her and she was never asked if Doctor Crants helped with advice or other efforts. *See* Tr. 351–53, 376, 403.

145. Mountain West alleges, but does not demonstrate, that Salt Lake City Family has, or intends to have, a contract with the broadcast management company, Media Central. After reviewing the exhibits and reading the complete testimony of Abraham G. Thiessen, President of Sterling Communications, in a proceeding to license Channel 40 in Portland, Oregon, BC Docket No. 82-254, it is evident that Mr. Thiessen's testimony in the Hartford proceeding does not demonstrate that he has personal knowledge

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[20] Mountain West finds support for its claim about Doctor Crants in a letter from Sterling Communications to Doctor Crants referring to a Salt Lake City Family amendment which was sent to him for his approval. Mountain West would have the Commission assume that a letter sent to a principal's brother indicates control. It may evidence no more than what is admitted: that Doctor Crants helped his brother with the application and that the amendment was sent to him because it involved information about his interests which was filed in this proceeding because of his relationship to his brother, Patrick Crants. Salt Lake City Family concedes that Jack Dalton and Doctor Crants advised and helped Rebecca Hewgley and Patrick Crants in preparing their application, but, that concession does not raise an inference that they will own the station; family members with broadcast experience frequently help one another.

of the facts which Mountain West asserts. Mr. Thiessen, in his testimony in BC Docket No. 82-254, explains that he kept a list of Sterling Communications' clients that were affiliated with Media Central. Salt Lake City Family was on Mr. Thiessen's list of Sterling's clients that he believed to be Media Central clients. The questions directed to Mr. Thiessen were not about the real parties-in-interest issue in this proceeding but about his list of what he believed were Media Central affiliates. While he testified that he believed that Salt Lake City Family had a contract with Media Central to become an affiliate, he does not state how he knew this to be the case. *See* BC Docket No. 82-254, Tr. 812. Mr. Thiessen is not a Media Central official or employee and he testified that his partner in operating Sterling Communications, Jim Price, handled Sterling's Media Central clients. Furthermore, Mr. Thiessen testified that Mr. Price handled Media Central relationships because he disliked the owner of Media Central and they did not get along. Salt Lake City Family principals have denied such an affiliation and the affidavit of Doctor Crants, who intended to become a Media Central principal, points out that he would have argued against such an affiliation. Mountain West does not provide any justification for believing that a list of contracts kept by a third party should be believed over the denial of the person who alledgedly had contracted.[21] (While there is no testimony or statement from Media Central that Mr. Thiessen was correct about Salt Lake City Family, it might have had its own reasons for telling Sterling Communications that Salt Lake City Family was an affiliate. What, if anything, Media Central told Sterling Communications is unknown.)

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[21] Mountain West argues in its reply to Salt Lake City Family's response that the existence of the alleged agreement between Salt Lake City Family Television and Media Central has not been directly denied by Salt Lake City Family Television; but that is not the case, Salt Lake City Family Television's Rebecca Hewgley stated categorically that: "I don't know who Media Central is." Tr. 352. And, in answer to the question, "There's never been any agreement with Media Central," she responded, "no, never." Tr. 352. In answer to an inquiry about whether there had been discussions between Media Central and Salt Lake City Family Television, she said, "No, sir." *Id.* Ms. Hewgley, it should be noted, kept the files of all agreements involving the applicant. Tr. 406. Mountain West also asserts in its reply that while Patrick Crants stated he had not heard of Media Central before this hearing, he signed an amendment to Salt Lake City Family's application dated March 2, 1982, which notified the Commission that his brother, Doctor Crants, had ended his affiliation with Media Central, Inc. and Morton J. Kent, d/b/a Canton 67, a partnership. The amendment which says no more than that about Media Central can hardly cast doubt about his statement in the context in which it has been made. The issue is whether Mr. Crants knew about Media Central and its alleged attempt to control and operate a facility licensed to Salt Lake City Family or any other broadcast facilities through affiliation agreements. A short statement in an amendment filed over three years ago about his brother's interest in a partnership involving Media Central hardly undermines his claimed lack of knowledge about Media Central. Moreover, if Mountain West had believed that the March 2, 1982 amendment was material to its allegations, it should not have waited to make that claim until Salt Lake City Family had no right to

146. Mountain West repeats its allegation that the Union Commerce Bank letter is dependent on not just the promises of Ms. Hewgley and Mr. Crants but also on the promise of Jack Dalton. There is no evidence submitted to support this allegation; it is premised on a conjectural reading of the bank's letter. Ms. Hewgley and Mr. Crants have explained that they submitted their financial statements to the bank and the bank issued the letter. There appears to be little question that the bank assessed the risk of lending to them and decided to do so. Short of fraud, the Commission does not inquire about the bank's review of collateral for a loan. Mountain West has not shown that its reasons for reopening the record of this proceeding are unusual and compelling; its request will be denied.

147. Ms. Hewgley and Mr. Crants do not live in Salt Lake City but they would move there. Ms. Freeman has nearly a decade of broadcast experience and she is currently employed in broadcasting. Mr. Crants and Ms. Hewgley would fulfill the Commission's policy to license more applicants with women and minority owners: Ms. Hewgley is a woman and Mr. Crants is Native American.[22] Family should be credited with management participation by 98% of its owners, both of whom hold qualities that enhance their proposal.

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reply. The amendment has been available to Mountain West since March of 1982.

[22] Mr. Crants has established his minority status by demonstrating that he is affiliated with the Seneca Nation and registered with the Bureau of Indian Affairs. No applicant claims that he does not meet the definition of a Native American supplied by OMB Directive 15; but Mountain West challenges the use of Directive 15 as a standard and suggests that Mr. Crants, is perhaps, not enough of a Native American to suit its personal view. While the latter view requires no response, the former is unsupported and inconsistent with the Commission's determination that the definitions of minorities in OMB Directive 15 would apply to EEO determinations made at this agency. *FCC Form 395 — EEO*, 70 F.C.C. 2d 1466, 1473 (1979). It is also the standard selected by Congress for awarding of minority preferences in the selection of licensees by lottery under § 309(f) of the Communications Act. H.R. Rep. No. 97-765, 97th Cong. 2d Session 45 (1982). Intermountain Broadcasting, Inc. claims that preferences based on sex and race are illegal; however, that argument when it was raised on similar facts was rejected by the Commission. *Waters Broadcasting Corporation* 91 F.C.C. 2d 1260 (1982), *aff'd subnom. West Michigan Broadcasting Corporation v. FCC*, 735 F. 2d 601 (D.C. Cir. 1984) *cert. denied*, 53 U.S.L.W. 3634 (1985).

148. *Mountain West Television Company* proposes that its four general partners, Joseph C. Lee, Sid W. Foulger, George L. Gonzales and Jo-Ann Wong would work full time in the management of the station. Mountain West maintains that although the partners have different ownership interests, they have equal voting rights. General partners in Utah generally have equal votes, unless the partnership agreement provides for a different weighing of interests. Shortly before the hearing, Mountain West amended its partnership agreement to insure that material partnership questions would be by equal vote. In actual fact, most decisions have been made by the partners who hold the major equity interests, Joseph C. Lee, who owns 44%, and Sid W. Foulger, who owns 34%. They prepared the application, made all decisions about Mountain West's proposal, and provided most of the money for pursuing the application. George L. Gonzales, who owns a 10% interest, and Jo-Ann Wong, who owns a 12% interest, have sometimes been told about decisions involving the partnership, but they have not voted on matters and they have not had a voice equal to Messrs. Foulger and Lee in making decisions about Mountain West's proposal.

149. Joseph C. Lee will be the Station Manager. He lives in Salt Lake City where he has been employed in broadcasting since 1948. Sid W. Foulger proposes to work as the station's General Manager. Mr. Foulger is not a resident of Salt Lake City but would move there if a grant is made.[23] Jo-Ann Wong would work at the station as Program Director. She is an Asian-American who lives in Salt Lake City where she is active in civic affairs. Ten years ago, she worked for two and one-half years primarily as a receptionist and occasionally as a reporter at Salt Lake City television station, KCPX-TV.

150. George L. Gonzales states in his written testimony that he would be the station's Public Affairs Director. But, on cross-examination Mr. Gonzales pointed out he did not select the title of Public Affairs Director, that the title was chosen by Messrs. Lee and Foulger and he was told about it. Mr. Gonzales views his role at the station as one that will involve the televising of his radio show, an entertainment show in Spanish and English which he had previously done on television. He believes that job would

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[23] Mr. Foulger does spend a few weeks in Salt Lake City each year and has had an association with the city because his construction company has done business there. However, he does not appear to be a local resident; his testimony indicates he has lived outside Washington, D.C. since 1960 where he operates a construction business.

take as much as two hours per week. Mr. Gonzales has produced the show he would now do on Channel 13 since 1952; he is not currently compensated for the program. He has worked at Hill Air Force Base since 1952 and, if the application is granted, he will retire from that job. Mr. Gonzales is Hispanic.

151. While Messrs. Lee and Foulger and Ms. Wong are clearly designated as management-owners having policy responsibilities, Mr. Gonzeles' proposal is one that involves only the production of a program for up to two hours per week. Because he could not specify what other tasks he would perform (in part, it is apparent, this results from the fact that he has not been treated as an equal partner in making decisions about his role) there is no reliable evidence on which to base a conclusion that he will be a full-time management person. The policy statement provides that some weight should attach to a full-time promise even if the role is not one that involves determining policy, but Mr. Gonzales is vague about what, if any, time will be required of him beyond the two hours he expects to spend. His proposal is too slight and too undefined to credit.

152. *West Valley City Television* has two limited and two general partners. Lela M. Ence and Robert S. Fotheringham, the general partners, propose to work full time in management of the station. Ms. Ence would be the General Manager and Mr. Fotheringham the General Sales Manager and Director of Promotion. They live and have lived for all or most of their lives inside the area of the proposed city grade signal. They have been active in local civic affairs. In addition, ten years ago, Mr. Fotheringham worked at a local radio station as Sports Director and announcer for three years. Their proposal is further enhanced because Ms. Ence is a female.

153. West Valley claims 100% integration for Ms. Ence and Mr. Fotheringham because, as the only two general partners, they purportedly control the affairs of the partnership. West Valley claims that the two limited partners, who are also Salt Lake City area residents, are simply passive investors. Typically this might well be the case, but the record reflects that H. Roger Boyer, a limited partner, who was an unsuccessful applicant for Salt Lake City Channel 14, has operated in this partnership no differently than when he was an officer-director and voting shareholder in the application for Channel 14. He instigated this proposal and he had the law firm that regularly represents him draw up the partnership agreement. Moreover, this was done with no apparent consultation with the general partners; in fact, Mr. Fotheringham

and Ms. Ence did not even know who prepared the partnership document and Ms. Ence never saw it until it was ready for her signature. In addition, Mr. Boyer keeps the bank account, signs the checks, secured and guaranteed the bank loan, and uses his office as the partnership address.

154. The governing partnership document also permits limited partners to involve themselves in the business of the partnership in a manner which Mr. Boyer, who has participated in as many as 40 real estate partnerships, described as unusual. West Valley TV's partnership agreement permits the limited partners to call meetings to discuss the partnership's business, to set the salaries of the general partners, to change the partnership agreement, and to approve any sale of the station. It not only requires limited partners to provide funds when needed but to guarantee bank loans. The partners explained that the size of this four party partnership made the arrangement less formal and has, thus far, permitted limited partners to participate in essentially all decisions.

155. While the record does not support a conclusion that Ms. Ence and Mr. Fotheringham will not participate in the management of the station, it does not suppport a conclusion that they alone will control West Valley TV. Mr. Boyer, a claimed limited partner, has been more important in the formation and operation of the partnership than either of the general partners. Mr. Boyer and Mr. Gardener, who is also Mr. Boyer's business associate, have exercised their interests more like stockholders in a close corporation where each owner holds common stock. The separation between limited and general partners is further diminished in West Valley TV's partnership by the partnership agreement which assigns to the limited partners rights beyond those normally given to passive investors. To assume that Ms. Ence and Mr. Fotheringham will exercise 100% of the control of the West Valley partnership would be artificial and contrary to the evidence of record.

Summary of Comparative Conclusions

156. Intermountain Broadcasting, Salt Lake City Family Television, Mountain Television and West Valley City Television have no interests in the mass media. Only Utah Television Associates receives a very slight demerit for the broadcast interest of its principal, Andrew Lawrence.

157. All of the applicants propose that owners will participate in the operation of the Channel 13 facility, but they do not all propose the same amount of participation and not all promises can be credited. Utah Television Associates proposes that owners holding 88.65% of the controlling general partnership interest will work in management and policy positions at the station. But the promise of Andrew Lawrence, a 44.66% general partner, to work at the station cannot be relied on because he previously failed, after a grant was made, to keep a similar promise he made to the Commission and he has offered no acceptable excuse for not fulfilling that promise. Dennis Valenzuela, a 33.66% general partner, cannot be credited because his role as a manager and policy maker is uncertain. Mr. Valenzuela's ownership interest and participation has been put forward to maximize any advantage UTA might receive for his Hispanic heritage. The original position UTA said that he promised to undertake at the station was changed after the B cut-off date when UTA was required to reduce his ownership share. Initially UTA represented that Mr. Valenzuela would be the Program Director when he briefly held an 80% interest, and after his ownership was reduced, he was proposed for News Director. Mr. Valenzuela was unaware of these promises until after they had been made. He did not know what office he held in the partnership, he has not been consulted about partnership decisisons and he views his participation as an opportunity to supplement his retirement income from the telephone company. When questioned about his role, he expressed no interest in making station policy and he stated that he assumed Mr. Lawrence would make policy decisions. When Mr. Valenzuela's views on his role are considered with his past performance in the partnership, it is apparent that he cannot be counted on to couple management and policy functions with ownership control. The third UTA general partner who proposes to manage is Richard S. McKnight, a 11.33% general partner and a 35% limited partner. Mr. McKnight's promise to manage the station is different from that which UTA told the Commission on the B cut-off date. Before UTA was forced to reduce Mr. Valenzuela's interest, it advised the Commission on the B cut-off date about which owners would manage and it specifically stated that limited partners would not. UTA's change of mind cannot, in fairness, be credited. UTA receives no credit for its proposal that owners will manage.

158. Intermountain's proposal, that its two owners will manage, will also not be credited. It is apparent that David and Deanna Williams, Intermountain's only two stockholders, have not made their promises in good faith. While they represented to the Commission in this proceeding that they would work full time, they also made a promise to the Commission to spend full time operating a cellular radio system in Salt Lake City. At no time did they ever condition one of the promises, nor did they advise the Commission about their dual promises.[24]

159. West Valley City Television and Mountain West have made proposals that can be only partially credited. West Valley City Television proposes that its two general partners will work at the station and there is every reason to believe that they will. But there is every indication the general partners do not exercise complete control of the applicant. The two limited partners in West Valley City Television have organized the partnership, managed its operation, participated in all decisions. In fact, they have been more active in the operation of the partnership and the pursuit of the application than either general partner. H. Roger Boyer, a limited partner, gave every indication in his testimony that this history portends the future. This appears to be possible because the formal partnership agreement permits, in many material respects, the participation of limited partners in controlling partnership activities. Moreover, there is nothing in the background of either of the general partners, Lela M. Ence and Robert S. Fotheringham, that would insure that control of West Valley City Television's limited partnership will shift to the sole authority of the general partners if a grant is made. It is apparent that West Valley City Television's integration proposal represents at best only 50% of the control of the partnership.

160. Mountain West proposes to integrate four general partners but it appears that only three of those partners will work at management and policy positions at the station on a full-time basis. One of the four, George L. Gonzales believes that his job at the station will be primarily to produce a program in Spanish and English that he currently presents on radio and has done in the past on television. In his view, this job will take no more than a few hours a week. His testimony reflects that he is not sure about any other jobs he might be expected to perform or how much time they might entail. That part of his proposal that is definite is too limited to warrant credit as either a full-time position or one that

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[24] Intermountain will also receive a comparative demerit for failing to report its inconsistent promises.

involves station policy and management. Mountain West is entitled to credit for 75% of its owners' promises to participate in management.

161. Salt Lake City Family Television promises that its 98% owners, Rebecca Hewgley and Patrick Crants, will manage and their proposal will receive full crdedit. Both Mountain West and Salt Lake City Family Television present qualitative reasons which enhance their promises to manage, and while Mountain West may be preferred in this respect, its qualities do not outweigh Salt Lake City Family's to such a degree that Salt Lake City Family's superior quantitative integration proposal should not prevail.[25]

ACCORDINGLY, IT IS ORDERED that the motion to reopen the record and to enlarge issues, filed March 29, 1985 by Mountain West Television Company IS DENIED.

IT IS FURTHER ORDERED that the applications of Utah Television Associates, Limited Partnership (File No. BPCT-801217KI), Intermountain Broadcasting, Inc. (File No. BPCT-810310KE), Joseph C. Lee, George L. Gonzales, et al.,

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[25] Mountain West's application presents a number of enhancing factors. The most important qualities are the local residency and minority ownership its proposal presents. Jo-Ann Wong, a 12% owner and proposed manager, and Joseph C. Lee, a 44% owner and manager, live in Salt Lake City. George Gonzales, who is a 10% owner and proposes to do programming at the station, lives in Ogden which is within the service area. Mr. Gonzales and Ms. Wong are members of minority groups. While Sid Foulger, who is a 39% partner and proposed manager, lives in Washington, he has participated in the Salt Lake City Chamber of Commerce; Mr. Gonzales has undertaken civic activities in Ogden and Mr. Lee and Ms. Wong have participated in Salt Lake City civic activities. In addition, Mr. Lee has substantial broadcast experience, Ms. Wong has worked at a station a number of years ago, and Mr. Gonzales produces a radio show and has produced a television show. Salt Lake City Family Television, on the other hand, has 98% of its stock held by a woman, Rebecca Hewgley, and minority group member, Patrick Crants. In the most important categories of local residency and minority ownership, which, if held in proportion, are equal, Mountain West has 56% local ownership and 10% by an owner who lives in the service area and will have some responsibilities at the station. In addition, it has female and minority owners who will work at the station, Ms. Wong and Mr. Gonzales; they hold, however, small partnership interests and Mr. Gonzales will not work at the station on a full-time basis in a responsible policy and management position. These factors when measured against Salt Lake City Family Television's 98% minority and female ownership of proposed managers, and in light of their promise to move to Salt Lake City, makes the applicants on the primary enhancement factors about equal. In the less important factor of broadcast experience, Ms. Hewgley of Salt Lake City Family has extensive broadcast experience but Mountain West's Mr. Lee has more than she does. However, Ms. Hewgley has a greater ownership share. In addition, Mr. Gonzales has broadcast experience that should be credited. Overall Mountain West is slightly better on broadcast experience. Mountain West's partners have all participated in civic activities and in this area they are to be preferred.

General Partners, d/b/a Mountain West Television Company (File No. BPCT-810511KL), and West Valley City Television Associates, Limited Partnership (File No. BPCT-810511KM) ARE DENIED and the application of Salt Lake City Family Television, Inc. (File No. BPCT-810511KK) to operate a new commercial television station on Channel 13 in Salt Lake City, Utah IS GRANTED.[26]

FEDERAL COMMUNICATIONS COMMISSION

EDWARD J. KUHLMANN, *Administrative Law Judge*

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[26] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Main Studio Location

Proposal to move main studio from city of license in Portsmouth, VA., to Virginia Beach, Va., which is 2½ times as populous, is denied, because station would leave no permanent physical presence in Portsmouth and residents would be inconvenienced by 20-35 minute trip each way to the studio.

—*Wavy Television, Inc.*

FCC 85-625

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of	
WAVY TELEVISION, INC. (WAVY-TV) Portsmouth, Virginia	File No. BMPCT-840413LP
For a Minor Change in Facilities	

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1985; Released: December 2, 1985

BY THE COMMISSION:

1. The Commission has before it for consideration: (1) the above application of WAVY Television, Inc. (WAVY) for a minor change in the facilities of Station WAVY-TV, Channel 10, Portsmouth, Virginia; (2) the November 21, 1984, action of the Chief, Video Services Division, denying that application; (3) WAVY's December 31, 1984, application for review of that action; and (4) related pleadings.[1]

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[1] The City of Portsmouth, Virginia (City) and Summit Communications, Inc. (Summit), permittee of a new commercial television station to operate on Channel 43 in Virginia Beach, Virginia — both of whom earlier filed informal objections to WAVY's application — oppose the application for review. In addition, on January 29, 1985, WAVY filed a motion for extension of time in which to file a reply pleading, which was subsequently opposed by City. The reply was filed nevertheless, and City responded with a Motion to Strike. City's argument is based on the fact that Section 1.115(f) of the Commission's Rules

2. WAVY currently maintains its main studio in Portsmouth, its community of license, but now proposes to relocate it 12 miles from Portsmouth to Virginia Beach. No other change is proposed. The respective populations of Portsmouth and Virginia Beach are 104,577 and 262,199. WAVY-TV is one of two television stations licensed to Portsmouth.[2] Summit's station would be the only television station authorized to Virginia Beach. 3. WAVY maintains that its present studio is structurally unsound with potential safety hazards. Consequently, it began to examine a number of alternative sites for a studio — both in and outside of Portsmouth. For a variety of reasons, all of the sites it considered in Portsmouth were rejected, and a site in Virginia Beach was selected, in part, because of the great flexibility in the studio design and the adequacy of parking that it would provide. WAVY further argued that the studio would be easily accessible to Portsmouth via several routes — approximately 20 to 25 minutes by car and with bus transportation also available. WAVY added that, because of its central location, utilization of the new site would enable the station to improve its coverage of its entire service area while maintaining its current level of service to Portsmouth. WAVY further stated that it would enhance its coverage of Portsmouth news events with electronic newsgathering (ENG) facilities there. Finally, WAVY noted that, in 1983, the Commission recognized the area's "common cultural, economic and political concerns." *Television Channel Assignments (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, 53 R.R. 2d 53 (1983), *recon. denied*, BC Docket No. 82-541, Mimeo No. 5932 (released August 17, 1983). Because of the area's shared community of interests, WAVY concluded that it is important for a television station in the Greater Hampton Roads area to serve the entire area and that the Virginia Beach site would help it to accomplish that result.

4. In their objections to grant of WAVY's original request City and Summit argued that WAVY had not demonstrated either the unavailability of studio space in Portsmouth or the existence of special public interest factors which would warrant the proposed studio relocation. *Jackson County Broadcasting, Inc.*, 45 R.R. 2d 1723 (1979); *South St. Paul Broadcasting Co.*, 43 F.C.C. 2d 600

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prohibits the filing of reply pleadings unless requested by the Commission. Although such a pleading was not solicited, we will, in our discretion, consider it.

[2] The other station licensed in Portsmouth, WYAH (TV), also has an application pending to relocate its main studio from a location inside of Portsmouth to a site in Virginia Beach (BPCT-840621KH).

(1973). To the contrary, City argued that there are a number of adequate studio sites within Portsmouth with at least one in the downtown area, but that WAVY never sought its assistance in solving any problems it had with any of the sites. City further maintained that WAVY confined its serious search for a studio to Virginia Beach, which, in contrast to an older and declining Portsmouth, is an affluent and growing community. City and Summit further alleged that the proposed site is not readily accessible to the residents of Portsmouth, being 27 to 37 minutes by car or 1½ to 2 hours by bus. Moreover, they argued that WAVY would not be able to maintain its current level of service to Portsmouth from the new site and that the proposed use of ENG facilities would be inadequate. Finally, Summit alleged that WAVY's reliance on decisions issued prior to *Suburban Community Policy, Berwick Doctrine and De Facto Reallocation Policy (Suburban)*, 93 F.C.C. 2d 436 (1983), *recon. denied* 56 R.R. 2d 835 (1984), was misplaced since those decisions were not subject to the stricter standard which is now being applied to requests for studio relocations.

5. In its opposition to the informal objections, WAVY argued that its proposed studio move would be fully consistent with Commission precedent and would not constitute an abandonment of its responsibilities as the licensee of a Portsmouth television station. In addition, WAVY alleged that, in cases such as this, the Commission has not required a licensee to show the unavailability of suitable sites in the community of license unless the proposed move appears to be part of an attempted *de facto* reallocation, which, it alleged, is not the case here. WAVY further argued that, when we abolished our *de facto* reallocation policy in *Suburban*, *supra*, we made it clear that no further examination of applications for modification of facilities would be necessary if licensees represent that they will maintain service to their cities of license and if there are objective factors demonstrating their capacity to do so. Since WAVY argued that such would be the case here, it concluded that the Commission need delve no further. It further added that we have, in the past, permitted a number of studio moves from one city to another in the Greater Hampton Roads area (*e.g.*, Stations WCMS and WCMS-FM from Norfolk to Virginia Beach and Station WNIS from Portsmouth to Norfolk). It contended that such moves were granted, in part, because of a community of interests among the communities, and it argued that this principle remains unchanged.

6. In denying WAVY's application, the staff stated that, while the *de facto* reallocation policy has been abolished, the Commission is, nevertheless, still concerned that its Television Table of Assignments not be subverted. This is achieved, the staff noted, by close adherence to the Commission's licensing rules, one of which is the location of a station's main studio in the community of license. *Suburban, supra*, 93 F.C.C. 2d at 456. Where an applicant proposes to locate its main studio outside that city, the staff stated that the licensee is generally required to show either that suitable sites within the community are not available or that special public interest reasons exist for moving outside of it. *Holt-Robinson of Texas, Inc.*, Mimeo No. 2919 (released March 15, 1984), *review denied*, 98 F.C.C. 2d 1243. The Bureau noted that, while WAVY had suggested and then rejected several potential sites within Portsmouth, it was unrealistic to believe that a suitable site could not be found in a city of that size. The staff added that, although Portsmouth's population is more than 100,000, Virginia Beach's population is more than twice that size. It was further noted that Virginia Beach is an affluent, growing community in contrast to Portsmouth, which appears to be in an economically declining state. Despite the fact that WAVY argued that the move would serve to enhance its coverage to the entire metropolitan area without decreasing service to Portsmouth, the staff found that the proposal would impose an unjustifiable hardship on the residents of Portsmouth attempting to travel to the Virginia Beach site. It also found that the use of ENG equipment in Portsmouth was not a substitute for a main studio there, since it would not allow the station to remain an integral part of the community or permit local residents to participate meaningfully in the station's programming. For these and other reasons, the staff found the proposed relocation not to be in the public interest and denied the application. On December 31, 1984, WAVY sought Commission review of that action.

7. In support of its application for review, WAVY argues that the staff's decision makes it virtually impossible for a licensee to move its studio to a community larger than the city of license, even where it is apparent that the licensee is willing and able to maintain its primary service commitment to its city of license. In addition, WAVY maintains that the staff erred in requiring it to demonstrate the unavailability of suitable sites in Portsmouth, since that intrudes on a matter that is "within a licensee's operation discretion." In this respect, WAVY contends that the staff was arbitrary in concluding that it was unrealistic to believe

that a suitable site could not be found in a city the size of Portsmouth. WAVY further contends that the standard set out in *Suburban*, *supra*, and relied upon by the staff, applies to transmitter — not studio relocations. WAVY maintains that, while the location of a station's main studio in the city of license may be a sign that the station intends to serve that community, the location of a studio outside the city of license does not necessarily suggest an intent to abandon service. To the contrary, WAVY asserts that it will not reduce its superior programming to Portsmouth but, rather, will enhance it through the use of ENG and other mobile studio equipment. It adds that the relocation will enable it to better serve the entire Tidewater area. Another stated advantage of relocating the studio to Virginia Beach, it argues, would be the construction of a modern studio with ample parking facilities in a safe neighborhood. This, it states, would still be convenient to the residents of Portsmouth, being only eleven miles away via a multi-lane highway. WAVY maintains that, unlike the situations in *Champion Broadcasting System, Inc.*, 22 F.C.C. 2d 408 (1970), *South St. Paul*, *supra*, and *Harron Communications Corporation*, Mimeo No. 511 (MMB released Oct. 31, 1983), it is not proposing to move its studio from a small, dependent town to the one central city in an area. Rather, it states, both Portsmouth and Virginia Beach are substantial cities in the Hampton Roads area, none of whose component communities can be considered dominant. In that connection, WAVY takes issue with the staff's conclusion that Portsmouth and Virginia Beach are disparate communities pointing to *Amendment of Section 3.606 of the Rules (Sixth Report and Order)*, 41 F.C.C. 148, 444 (1952), where the Commission recognized a commonality of interests among some of the cities in the Greater Hampton Roads area.

8. In opposition to the application for review, City argues that the main studio rule was established to make stations readily accessible to the residents of the communities they are primarily licensed to serve and to insure that stations realistically meet their obligation to serve as outlets for local self-expression. It maintains that the rule took on added significance in 1983 with the abolition of the *de facto* reallocation policy. Accordingly, City asserts that the main studio rule is now one of the "licensing rules" with which a broadcaster must comply in order to preserve the presumption that it intends to serve its community of license. *Suburban*, *supra*, 56 R.R. 2d at 836 n. 7. City argues that the staff properly required a demonstration of the unavailability of

suitable sites in Portsmouth, and it asserts that WAVY has not only failed to show such unavailability, but has also failed to demonstrate any other public interest justifications for the move. City contends that the inadequacy of several investigated sites in Portsmouth does not mean that none are available. Moreover, City argues that WAVY failed to inform it of the problems it had with certain of the sites and did not seek the City's assistance in addressing them. With respect to WAVY's argument that it could better serve the entire Tidewater area from the proposed site, City cites *Harron Communications Corporation*, supra, where such a justification was rejected. City notes that, in *Harron*, the staff concluded that "[i]f news coverage of (the larger city) is impaired by the remoteness of the (existing) studio, it would seem to follow that coverage of the (community of license) would suffer by location of (the) main studio in (the larger community)." Finally, City argues that WAVY may not claim that Virginia Beach has a commonality of interests with the other Tidewater cities, since the Commission has already held to the contrary. *Television Table of Assignments (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, 53 R.R. 2d 53, 56 (Policy and Rules Div. 1983), *recon. denied*, Mimeo No. 5932 (MMB released Aug. 17, 1983).[3]

9. In addition to rearguing points previously made, WAVY, in reply, contends that the staff's reliance on *Holt-Robinson, supra*, is misplaced, in part, because that case erroneously states that we "generally" require applicants seeking to move their studios outside their communities of license to demonstrate the unavailability of suitable sites within the communities. WAVY contends, that such a showing is not "generally" required. Rather, it states, a showing is necessary only "when the applicant seeks to relocate the studio in a nearby central city of considerable greater size *and* there is a question as to whether the station will abandon service to the smaller community of license." *Jersey Cape Broadcasting Corporation*, 89 F.C.C. 2d 984, 987 (1982) (emphasis supplied). Because there is no central city of overshadowing dominance in the Tidewater area and because the station does not propose a reduction in service, WAVY maintains that it need not demonstrate the unavailability of suitable sites in Portsmouth. WAVY further argues that City erroneously equates the station's intention to improve service to the entire area with a loss of service to Portsmouth itself. Rather, it argues, a television licensee in a metropolitan area is expected to provide service throughout the

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[3] Summit has filed comments in support of City's opposition.

area. *Cleveland Television Corp.*, 91 F.C.C. 2d 1129, 1137 (Rev. Bd. 1982), *review denied*, F.C.C. 83-235 (released May 18, 1983), *affirmed*, 732 F.2d 962 (D.C. Cir. 1984). Finally, with respect to the distance between Portsmouth and the site of the proposed studio, WAVY contends that a travel time of 20 or 30 minutes is entirely reasonable.

10. Section 73.1125(a)(3) of the Rules requires a television broadcast station to maintain its main studio in its city of license except "when good cause exists for locating the main studio outside the principal community to be served and ... to do so would be consistent with operation of the station in the public interest." The purpose of the rule, as explained in *FM-TV Studio Moves*, 27 F.C.C. 2d 851, 852 (1971), is:

> to make broadcast stations readily accessible to the people in the communities which they are primarily licensed to serve, and they constitute one of the essential ways we have for insuring that stations realistically meet their obligation to serve their communities of license as outlets for local self-expression.

In 1983, the main studio rule took on added significance with our abolition of the *de facto* reallocation policy. *Suburban*, *supra*. While not abandoning our requirement that a station provide service to its city of license, we, nevertheless, decided no longer to question whether a broadcaster intends to abandon its city of license so long as the station is in compliance with certain licensing rules. In this respect, we stated:

> [I]n the future, we will examine applications to determine compliance with our licensing rules. If that exists, we will presume the licensee intends to serve the community designated. Compliance with the rules will result in the requisite signal to the community of license, location of *the main studio in that community* and a programming proposal that will serve the needs of the community of license. Abolition of this policy does not mean that we will countenance subversion of our rules or the Tables (of Assignment). [*Id.*, at p. 456, emphasis added].

The fact that the *de facto* reallocation policy was usually applied to transmitter — as opposed to studio — relocations, does not diminish the force of this language. It was our intent then, as it is now, to scrutinize proposals seeking to relocate main studios outside communities of license, especially where the proposed site would be in a community of far greater population or where it appears that such a move would result in a loss of service to the community of license.[4]

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[4] With the exception of two cases, both of which are distinguished below, all the decisions cited by the applicant in support of its position precede our 1983

11. When Channel 10 was originally allocated, the Commission made it available to Norfolk, Portsmouth, or Newport News because of the "high degree of common interests within these three cities." *Sixth Report and Order, supra* at p. 444. There was no suggestion at that time, however, that Virginia Beach should be included among the cities eligible for the channel. More recently, we refused to include Virginia Beach in the Norfolk-Portsmouth-Newport News-Hampton hyphenated market. *Television Table of Assignments, supra*, 53 R.R. 2d at 56. It is a fact that Virginia Beach has a population that is 2½ times larger than the population of Portsmouth. Moreover, as noted by the City, Portsmouth has declined in population over the last 20 years, while Virginia Beach has experienced considerable growth. Although there is another television station licensed to Portsmouth, WAVY-TV is the only VHF outlet and the only network affiliate located there. Consequently, we view with care any attempt by WAVY-TV to abandon Portsmouth as the location of its main studio in favor of the larger Virginia Beach.[5]

12. While there is no indication that WAVY will actually reduce its programming for Portsmouth as a result of the proposed move, that alone is not determinative. Among the other factors to be considered are the availability of alternate sites in Portsmouth, the relative convenience of the proposed site to Portsmouth residents, the presence the station will maintain in Portsmouth, and the public interest benefits that will be realized by operating from the Virginia Beach site. In *River Bend Broadcasting Co., Inc.*, 46 R.R. 2d 1709, 1710 (1980), we stated that "a main studio readily accessible to a community of license is an essential and integral means by which the Commission assures service to the community of license and involvement in community affairs." WAVY's proposed studio would be 12 miles from Portsmouth, and a resident of that city would be required to travel between 20 and 35 minutes each way by car and up to two

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action in *Suburban*, which requires closer scrutiny of main studio moves outside the community of license.

[5] WAVY attempts to equate the situation before us with that in *Adams TV of Lansing, Inc.*, 57 R.R. 2d 380 (MMB 1984), where the Bureau recently allowed a station to move its main studio from one community to another one twice as populous. In that case, however, the Bureau noted that no one city was intended as the place to be served by the station but, rather, a single area-wide service was anticipated when the Commission allocated the channel. It found, therefore, that the location of that station's main studio in a particular community was less significant than when such relocations are proposed by stations more typically allocated. Because those unique circumstances do not obtain here, *Adams* is easily distinguishable.

hours by bus to visit the studio. We agree with the staff that this is an unjustifiable and unnecessary hardship to impose on the residents of Portsmouth, in the absence of countervailing public interest factors.[6] *See*, *Holt-Robinson*, *supra*, where we recently denied a proposal requiring approximately 30 minutes travel time.

13. Although WAVY proposes to use ENG and other mobile studio equipment to maintain its primary service commitment to Portsmouth, the use of such equipment cannot match the maintenance of a main studio there for meaningful participation by local residents in the station's programming.[7] Further, although WAVY claims that the greater accessibility of the Virginia Beach site to the entire Tidewater area will enhance its coverage of areas other than Portsmouth, we are unable to see how the public interest of Portsmouth would benefit from such a move. As the staff indicated, if WAVY believes that it can better serve its entire coverage area with studio facilities in Virginia Beach, it is free to establish and operate an auxiliary studio there.

14. WAVY also argues that we may not legitimately require it to demonstrate the unavailability of suitable sites in Portsmouth, since that intrudes on a matter that "is within a licensee's operating discretion" and since there is clear Commission precedent to the contrary. First, since the establishment of the main studio rule, licensees have never had unbridled discretion to relocate their main studios outside their communities of license. In all cases where an applicant proposes a studio site outside the community of license, the Commission must first conclude that such a move would be consistent with the public interest. As WAVY points out, in the past we have required a showing as to the unavailability of suitable sites within the community of license where (a) the studio would be relocated to a central city of considerably greater size and (b) where there was a question as to whether the station would abandon service to the smaller commu-

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[6] WAVY argues that *Community Tele-communications, Inc.*, FCC 84-525, Mimeo No. 35231 (released Dec. 5, 1984), is apposite. In that case we found 22 miles not to be an unreasonable distance for a broadcaster to recruit minority employees to comply with our Equal Employment Opportunity rules. The standard of reasonableness for driving times for paid employees, however, is entirely different than that for members of the public who visit the studio without obligation or remuneration.

[7] As noted in paragraph 10 above, the location of a station's main studio in the community of license, with the station's concomitant daily presence therein, promotes effective public participation in station operations and ensures the station's integration in the activities of the community it is primarily licensed to serve. See *Amendment of Section 3.606 [now 73.1125] of the Commission's Rules*, 8 R.R. 216 (1952).

nity of license. *Jersey Cape*, *supra*. That, however, is essentially the situation we have before us. While we need not decide whether Virginia Beach should be considered a "central city", it is, nevertheless, 2½ times as populous as Portsmouth, and the disparity is increasing, as Virginia Beach has become the fastest growing city in the Tidewater area. Moreover, we have already noted that, as a result of the proposed move, WAVY will discontinue any permanent physical presence in Portsmouth. Under such circumstances, we believe it is not only appropriate, but also consistent with past policy, to require a showing as to the unavailability of suitable sites in Portsmouth. The question now becomes whether WAVY has, in fact, made such a demonstration. Although WAVY did, apparently, consider some alternate sites in Portsmouth, it did not find any that would meet its specifications. This is not to say, however, that none exist in a city of that size, especially in light of the fact that City is willing to assist the station is finding and developing a suitable site in Portsmouth.

15. We have reviewed the action of the Chief, Video Services Division, and we conclude that the matter was fairly considered and properly decided. The staff correctly applied our policy with respect to the location of a station's main studio and disposed of all of the relevant and material contentions of the parties. We do not dispute WAVY's contention that its present studio facilities are inadequate and that new facilities at a different location are necessary; we merely affirm the staff's ruling that good cause for locating WAVY's main studio outside of Portsmouth has not been shown.

16. Accordingly, IT IS ORDERED, That WAVY's January 29, 1985, motion for extension of time IS GRANTED, and City's February 8, 1985, motion to strike IS DENIED.

17. IT IS FURTHER ORDERED, That WAVY's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLLIAM J. TRICARICO, *Secretary*

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16. Accordingly, IT IS ORDERED, That WAVY's January 29, 1986, motion for extension of time IS GRANTED, and City's February 6, 1986, motion to strike IS DENIED.

17. IT IS FURTHER ORDERED, That WAVY's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, Secretary

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